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No. 95-74

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

DON W. STEPHENS, Commissioner, Department of Insurance, Commonwealth of Kentucky, and the KENTUCKY STATE ASSOCIATION OF LIFE UNDERWRITERS; INDEPENDENT INSURANCE AGENTS OF KENTUCKY, INC.; KENTUCKY ASSOCIATION OF PROFESSIONAL INSURANCE AGENTS,

Petitioners,

v.

THE OWENSBORO NATIONAL BANK; THE FIRST NATIONAL BANK OF LOUISA; CITIZENS NATIONAL BANK OF PAINTSVILLE; KENTUCKY BANKERS ASSOCIATION, and UNITED STATES OF AMERICA,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

STEPHEN B. COX
Assistant General Counsel
Kentucky Department
of Insurance
229 West Main Street
P.O. Box 517
Frankfort, KY 40601
(502) 564-6037
Attorney for Petitioner Commissioner of Insurance

ANN M. KAPPLER *
SCOTT A. SINDER
JENNER & BLOCK
601 Thirteenth Street, N.W.
Twelfth Floor
Washington, D.C. 20005
(202) 639-6000
Attorneys for the Insurance Agent Petitioners

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTIONS PRESENTED

1. Whether, under a traditional pre-emption analysis, Section 13 of the Federal Reserve Act, 12 U.S.C.A. § 92 (Supp. V 1993), pre-empts Ky. Rev. Stat. 287.030(4), a state law pertaining to the licensure of insurance agents —regulation which lies at the heart of States' traditional police powers?

2. Whether the McCarran-Ferguson Act, 15 U.S.C. § 1012, dictates that Section 13 of the Federal Reserve Act, 12 U.S.C.A. § 92—a law enacted to regulate the activities of national banks—may not be interpreted to invalidate, impair, supersede or pre-empt state laws controlling the entities that may be licensed to sell insurance within those States?

3. Whether a state law controlling the entities that may be licensed to sell insurance within the State can be enacted "for the purpose of regulating the business of insurance" within the meaning of the McCarran-Ferguson Act, 15 U.S.C. § 1012?

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DON W. STEPHENS, Commissioner, Department of Insurance, Commonwealth of Kentucky, and the KENTUCKY STATE ASSOCIATION OF LIFE UNDERWRITERS; INDEPENDENT INSURANCE AGENTS OF KENTUCKY, INC.; KENTUCKY ASSOCIATION OF PROFESSIONAL INSURANCE AGENTS,

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Don W. Stephens, Commissioner of the Department of Insurance for the Commonwealth of Kentucky (the "Commissioner"), Kentucky State Association of Life Underwriters, Independent Insurance Agents of Kentucky, Inc., and Kentucky Association of Professional Insurance Agents (the last three collectively as "Insurance Agents" and with the Commissioner as "Petition-

ers"), respectfully request that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this action. More precisely, petitioners request that the Court hold this petition pending review of the judgment entered by the United States Court of Appeals for the Eleventh Circuit in *Barnett Bank of Marion County, N.A.*, 43 F.3d 631 (11th Cir. 1995) (*reprinted in* Appendix J to this Petition ("Pet. App. J") at 64a-77a), *cert. petition filed* No. 94-1837 (May 8, 1995), and then grant the petition, vacate the Sixth Circuit's decision, and remand for reconsideration in light of this Court's decision in *Barnett*.

OPINIONS BELOW

The opinions of the Court of Appeals and of dissenting Circuit Judge Batchelder were entered on December 29, 1994; are reported at 44 F.3d 388; and are reproduced in Pet. App. A at 1a-25a. The opinion of the United States District Court for the Eastern District of Kentucky, Frankfort Division, was entered on August 4, 1992; is reported at 803 F. Supp. 24; and is reproduced in Pet. App. B at 26a-49a. The Court of Appeals' order denying a timely petition for rehearing was entered on March 15, 1995; is unreported; and is reproduced in Pet. App. C at 50a-51a. The opinion of the Court of Appeals for the Eleventh Circuit that conflicts with the decision in this case was entered on January 30, 1995; is reported at 44 F.3d 388; and is reproduced in Pet. App. J at 64a-76a. The Louisiana state court opinion that also conflicts with the decision in this case was entered on March 3, 1995; is reported at 652 So.2d 562; and is reproduced in Pet. App. K at 77a-106a.

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was issued on December 29, 1994. A timely petition for rehearing and suggestion for rehearing en banc was denied on March 15, 1995. On June 1,

1995, this Court granted Petitioners' motion for an extension of time to file this Petition to and including July 13, 1995. No. A-916 (June 1, 1995). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 13 of the Federal Reserve Act, 12 U.S.C.A. § 92 (Supp. V 1993), is set forth in full in Pet. App. D at 52a. Section 2 of the McCarran-Ferguson Act, 15 U.S.C. § 1012, is set forth in full in Pet. App. E at 53a. Kentucky Revised Statute ("Ky. Rev. Stat.") Section 287.010 is set forth in full in Pet. App. F at 54a-55a. Ky. Rev. Stat. Section 287.030 is set forth in full in Pet. App. G at 56a-57a.

STATEMENT OF THE CASE

The judgment entered by the Sixth Circuit is squarely in conflict with the Eleventh Circuit's decision in *Barnett* and with the Louisiana state court's final decision in *First Advantage Ins., Inc. v. Comm'r of Ins. St. of Louisiana*, 652 So.2d 562 (La. Ct. App., First Cir. 1995) (*reprinted in* Pet App. K at 77a-106a), *cert. denied*, No. 95-C-0820 (La. S. Ct. May 5, 1995) (*reprinted in* Pet. App. L at 107a-108a), *cert. petition filed* No. 94-2130 (June 27, 1995) ("*First Advantage*"). Petitions for Writs of Certiorari have now been filed in all three cases.[1] The issues presented here are of significant importance to the banking and insurance industries and their customers, and are likely to arise in other States. Indeed, a case is currently pending in a federal district court in Connecticut raising virtually identical issues. *See Shawmut Bank Connecticut, N.A. v. Googins, et al.*, No. 3:94CV146(RNC) (U.S.D.C. D. Conn.). Accordingly, this case presents

[1] Petitioner Insurance Agents' counsel represents the insurance agent association parties in all three of these cases.

issues worthy of review by this Court, but the proper case in which to consider those issues is *Barnett*.

For the reasons delineated below, Petitioners urge the Court to resolve the conflict by granting the petition in *Barnett*, and holding this petition pending review of the Eleventh Circuit's judgment. In the alternative, Petitioners request that this Petition be granted and this case be consolidated with *Barnett* for review.

A. The Issue Presented.

As recognized by the courts and Congress, regulation of the insurance industry in this country has been reserved for the States. At issue in this case is the authority of the Kentucky Commissioner of Insurance and other state insurance regulators around the country to exercise their traditional police power to regulate the sale of insurance. The same fundamental question is at the heart of this case, *Barnett* and *First Advantage*: Who may regulate insurance activities, including determining which entities may be licensed to sell insurance within a State's borders? Is the State Legislature the final determinant, exercising its authority through statutes implemented and enforced by the Commissioner of Insurance? Or can the federal government *sub-silentio* dictate how insurance activities are conducted in each State?

Insurance is a highly regulated industry. Those who market and sell insurance—agents, brokers, consultants, solicitors, and the like—are generally regulated through licensure. Qualifications for licensure—testing and continuing education requirements, for example—are designed to ensure that sellers understand the product they are marketing and are responsible for their actions. The license renewal process and administrative inquiries which can result in license suspension or revocation permit regulators to enforce laws designed to protect the insurance-buying public—laws such as unfair trade practice restrictions.

Like any other potential insurance agent, both state and national banks (and their subsidiaries) are subject to the licensing requirements of state law. A central provision of Kentucky law, Ky. Rev. Stat. 287.030(4), prohibits all bank holding companies and their subsidiaries, including state and national banks, from selling broad forms of insurance.[2] Consistent with this provision, prior to the instant litigation, no bank subsidiary of a bank holding company—including any national bank—had ever been licensed to sell general insurance in Kentucky. In enacting this law, the Kentucky legislature, as the primary regulator of the business of insurance within the State, was forced to grapple with the difficult consumer protection issues posed by bank sales of insurance. The *Barnett* district court discussed some of these problems at length in the course of examining the State of Florida's parallel provision:

> For example, in order to make a profit on automobile loans or home mortgages, the insurance agents may incur business they might otherwise reject because they would be pressured by the bank to do so in order to consummate the bank's loan transactions. This might lead to the over-insurance of risky business, which could result in the insolvency of the insurer.
>
> Additionally, and notwithstanding the existence of specific prohibitions on coercive credit extension, the Court finds that loan officers could steer customers to the bank's insurance agent for the purpose of suggesting the sale of insurance that is not needed, in order for the bank to make a profit on the insurance policy. The concern herein expressed is that an arms-length relationship be maintained among the bank, the loan officer and the insurance agents. The maintenance of this relationship is for the protection of the solvency of the insurance industry, and the

[2] Bank holding companies and banks are permitted to sell credit-related insurance.

prevention of coercion, which in turn protects all potential, present and future policyholders.

Barnett Bank of Marion Co., N.A. v. Gallagher, 839 F. Supp. 835, 842 (M.D. Fla. 1994), *aff'd*, 43 F.3d 631 (11th Cir. 1995). Many other States have made similar policy decisions to maintain some degree of separation between banking and insurance. Indeed, at least fourteen other States, including Florida and Louisiana, have laws like Kentucky's that restrict banks from being licensed to sell general forms of insurance.[3]

In the decision at issue, the court of appeals affirmed the district court's ruling that Section 13 of the Federal Reserve Act, 12 U.S.C.A. § 92 (Supp. V 1993),[4] which permits national banks to act as general insurance agents in any place with a population not exceeding 5,000, preempts Ky. Rev. Stat. 287.030(4). This decision is incorrect for two reasons. First, Section 92 must be reconciled with Section 2(a) of the McCarran-Ferguson Act, 15 U.S.C. § 1012(a), which dictates that all who engage in the business of insurance must abide by state law regulating that business. This reconciliation mandates an

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[3] *See* Conn. Gen. Stat. Ann. § 38a-755 (West 1992 & Supp. 1994); Fla. Stat. Ann. § 626.988 (West 1984 & Supp. 1995); La. Rev. Stat. Ann. § 6:121B(2) (West 1954 & Supp. 1995); Me. Rev. Stat. Ann. tit. 24-A, § 1514-A (West 1990 & Supp. 1994); Mass. Ann. Laws ch. 175 & 174E (Law. Co-op. 1987 & Supp. 1995); Nev. Rev. Stat. Ann. § 683A.110 (Michie 1992 & Supp. 1993); N.H. Rev. Stat. Ann. § 384:15-b(II) (1983); N.J. Stat. Ann. § 17:C-1 (West 1993); Pa. Stat. Ann. tit. 40, § 281(b) (1992); R.I. Gen. Laws §§ 27-3-46, 27-3-47 (1994); Tenn. Code Ann. § 56-6-201 (1994); Tex. Ins. Code Ann. art. 21.07-3 § 5(h) (West 1993); Vt. Stat. Ann. tit. 8, § 4811 (1993); W. Va. Code § 31A-8C-1, 31A-8C-2(f) (1994).

[4] This provision is commonly known as "Section 92" and will be referred to as such herein. *See United States Nat'l Bank of Oregon v. Independent Insurance Agents of America, Inc.*, 113 S.Ct. 2173 (1993) (discussing the tortured history of this provision).

interpretation of Section 92 so as not to conflict with Kentucky's prohibitive statute. Second, as both the *Barnett* and *First Advantage* courts concluded, even if Section 92 and the Kentucky statute conflict, Section 2(b) of the McCarran-Ferguson Act dictates that Section 92 may not be interpreted to supersede or pre-empt licensing prohibitions like Ky. Rev. Stat. 287.030(4)—laws "enacted for the purpose of regulating the business of insurance."

B. Statutory Framework.

1. The McCarran-Ferguson Act—Leaving Regulation of the Business of Insurance to the States.

The McCarran-Ferguson Act, 15 U.S.C. §§ 1011 *et seq.*, makes clear, as a matter of federal law, that the States are the penultimate authority in the insurance realm unless Congress intentionally and expressly overrides that authority. Section 2(a) of McCarran is explicit:

> The business of insurance, *and every person engaged therein,* shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

15 U.S.C. § 1012(a) (emphasis added). McCarran's Section 2(b) further provides that:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance.

15 U.S.C. § 1012(b).[5] This law, originally enacted in 1944, did not articulate a new federal policy but instead

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[5] As even the "Declaration of Policy" provision of McCarran clarifies,

> Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that *silence on the part of the Congress*

sought to ensure that the States were permitted to remain the primary regulators of the business of insurance.

Until 1944, it had been universally understood that the States maintained exclusive control over the regulation of insurance. *E.g., United States Dep't of Treasury v. Fabe,* 113 S. Ct. 2202, 2207 (1993); *St. Paul Fire & Marine Ins. Co. v. Barry,* 438 U.S. 531, 539 (1978). This axiom of state regulation had existed at least since 1869, when the Supreme Court decided *Paul v. Virginia,* 75 U.S. (8 Wall.) 168 (1869). *Paul v. Virginia* involved an appeal by an insurance agent from a fine imposed for selling coverage for a New York insurer that was not properly licensed in Virginia. In disposing of the agent's argument that Virginia licensing laws violated the Commerce Clause of the U.S. Constitution, the Court held that "[i]ssuing a policy of insurance is not a transaction of commerce." *Id.* at 183. Cases following *Paul v. Virginia* held that not only the issuance of a policy, but the entire business of insurance, was *not* commerce regulable by Congress. *E.g., Hooper v. California,* 155 U.S. 648, 649 (1895); *New York Life Ins. Co. v. Deer Lodge County,* 231 U.S. 495, 506 (1913). Consistent with this case law, Congress had repeatedly refused to extend federal authority over the insurance business, concluding that the regulation of the insurance business was beyond Congress' power. *See, e.g.,* Sen. Rep. No. 4406, 59th Cong., 1st Sess. (1906); H.R. Rep No 2491, 59th Cong, 1st Sess., 12-25 (1906).

All this changed in 1944 with the United States Supreme Court's decision in *United States v. South-Eastern Underwriters Ass'n,* 322 U.S. 533 (1944), a case cited by the Eleventh Circuit, the *First Advantage* court and the dissent written by Circuit Judge Batchelder below but,

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shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

15 U.S.C. § 1011 (emphasis added).

notably, not by the Sixth Circuit majority in this case. In upholding a criminal indictment for alleged Sherman Act violations, the Court in *South-Eastern* held, for the first time, that an insurance company was subject to the federal antitrust laws. The decision "naturally, was widely perceived as a threat to state power to tax and regulate the insurance industry." *Fabe,* 113 S. Ct. at 2207. Congress reacted by enacting the McCarran-Ferguson Act. *FTC v. Travelers Health Ass'n,* 362 U.S. 293, 299 (1960). McCarran restored oversight of the insurance industry to the States, except with regard to antitrust issues where a State had failed to act. 15 U.S.C. §§ 1011 *et seq.*

As this Court has explained, McCarran "transformed the legal landscape by overturning the normal rules of pre-emption":

> Ordinarily, a federal law supersedes any inconsistent state law. The first clause of § 2(b) reverses this by imposing what is, in effect, a clear statement rule, a rule that state laws enacted "for the purpose of regulating the business of insurance" do not yield to conflicting federal statutes unless a federal statute *specifically requires otherwise.*

Fabe, 113 S.Ct. at 2211 (emphasis added). Disagreement over the parameters of the first prong of this test—determining whether a state law was enacted "for the purpose of regulating the business of insurance"—has created the conflict this Court must now address.

2. *The State Law at Issue.*

The state statute at issue in this case, Ky. Rev. Stat. 287.030(4), is part of a statutory provision entitled "Limitation on right to engage in business" and pertains to banks and bank holding companies. Enacted in its present form in 1984 as part of Kentucky's Bank Holding Company Act, Ky. Rev. Stat. 287.030(4) prohibits bank holding companies and their subsidiaries from acting as

agent or broker with respect to "insurance except credit life insurance, credit health insurance, [or] insurance of the interest of a real property mortgaged property, other than title insurance." Ky. Rev. Stat. 287.030(4).[6]

In definitive interpretations, the Kentucky Attorney General has ruled that the prohibition is applicable to national banks. *See* Ky. OAG 70-643 (*reprinted in* Pet. App. I at 60a-63a). In reliance on these opinions, the Commissioner of Insurance has taken the position that Ky. Rev. Stat. 287.030(4) prohibits the licensure of national bank subsidiaries of bank holding companies to sell non-credit insurance.[7]

3. *Section 92.*

At the heart of this case is the Respondents' assertion that, as it applies to national banks located in towns of 5,000 or less, Ky. Rev. Stat. 287.030(4) is pre-empted by Section 92. In contrast to state-chartered banks, national banks are creatures of federal law, chartered by the federal government. The principal statute governing their creation and operation is the National Bank Act. Despite their federal nature, however, "regulation of [national] banking has been one of dual control since the passage of the first National Bank Act in 1863." *National State Bank, Elizabeth, N.J. v. Long*, 630 F.2d 981, 985 (3d Cir. 1980). As this Court explained in *McClellan v. Chipman*, 164 U.S. 347 (1896), "[n]ational banks . . . are governed in their daily course of business far more

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[6] This prohibited insurance will herein be referred to as "non-credit" insurance.

[7] This interpretation of state law is not at issue in this case. On January 31, 1991, the House of Representatives of the Kentucky General Assembly passed a resolution confirming the Commissioner's interpretation and requesting that the banking industry refrain from seeking to be licensed to sell insurance other than that allowed under Ky. Rev. Stat. 287.030. Ky. House Resolution 91-SS-BR-63 (*reprinted in* Pet. App. H at 58a-59a).

by the laws of the State than of the nation." *Id.* at 356 (internal quotation omitted).

To protect the integrity of the banking system, prevent unfair competition, and safeguard the general public, federally-regulated banking institutions, including national banks, are generally prohibited from engaging in the business of insurance. Section 24 of the National Bank Act, 12 U.S.C. § 24, which sets forth the banking powers of national banks, has been consistently interpreted as strictly limiting the permissible insurance agency activities of national banks.[8]

In 1916, then-Comptroller John Skelton Williams urged Congress to enact a narrow exception to this general prohibition to provide a modicum of financial assistance to nationally-chartered banks located in "small country communities," which had experienced financial difficulties. 53 Cong. Rec. 11001 (1916). Empowering these "small national banks" to sell insurance would, in the Comptroller's judgment, enable them to compete with state-chartered banks in these non-banking areas of business and "provide them with additional sources of revenue," thereby encouraging them to provide banking services to the inhabitants of sparsely populated areas. *Id.* Comptroller Williams noted that under the National Bank Act, national banks were not then empowered to act as agents for insurance companies. *Id.* Congress enacted Comptroller Williams' proposed legislation without discussion or debate. *See United States Nat'l Bank of Oregon v. Independent Ins. Agents of Am., Inc.*, 113 S. Ct. 2173 (1993).

The statutory provision, as well as the legislative history, is entirely silent as to its effect on state law. In

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[8] *See, e.g., American Land Title Ass'n v. Clarke*, 968 F.2d 150 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 2959 (1993); *Saxon v. Georgia Ass'n of Independent Ins. Agents*, 399 F.2d 1010, 1016 (5th Cir. 1968).

its nearly 80 years of existence, only decisions entered in this case have ever even suggested that Section 92 pre-empts more restrictive state law. *See* Pet. App. A; Pet. App. B. Prior to these decisions, it was universally understood that state law applies to national banks despite Section 92. Every other tribunal to address the issue—the Louisiana trial and appellate courts in *First Advantage*, and the U.S. District Court for the Middle District of Florida and the Eleventh Circuit in *Barnett*—has agreed.

C. Proceedings Below

1. *The Respondents.*

Respondents include three national-bank subsidiaries of bank holding companies purportedly desiring to sell general lines and life insurance in Kentucky. Two Respondents, The First National Bank of Louisa and Citizens National Bank of Paintsville, have principal offices located in Kentucky towns with populations under 5,000, as shown by the last decennial census; the other bank respondent, The Owensboro National Bank, has a branch office in Whitesville, Kentucky, which also has a population under 5,000. In letters to the Commissioner of the Kentucky Department of Insurance in late 1990 seeking applications for insurance agent licenses, the banks maintained that Section 92 entitles them to the authority they seek, despite contrary Kentucky law.

2. *The Kentucky Department of Insurance Administrative Proceeding and the District Court Case.*

Consistent with past practice, the Department did not supply applications to the banks, because such applications are submitted on behalf of corporate agent applicants only by sponsoring insurance companies, not by the agent-applicants. In order to permit full consideration of the banks' position and to address the numerous questions of law and public policy implicated by their request,

however, the Commissioner instituted an administrative proceeding to determine whether Kentucky law permits the national banks to hold such licenses and, if not, whether Ky. Rev. Stat. 287.030(4) is pre-empted by federal law.

Not satisfied with this administrative procedure, the banks instituted this lawsuit, seeking declaratory and injunctive relief.[9] Their complaint raised the same issues that were under consideration in the Department's administrative proceeding. The banks also obtained a stay of the administrative proceeding pending resolution of the federal court litigation.

The district court then granted the banks' request for a declaratory judgment concluding that the state law conflicts with the federal law and that the McCarran-Ferguson Act does not save the state law from pre-emption. Pet. App. B. In reaching this later conclusion, the court held that, although Section 92 does not "specifically relate to the business of insurance," McCarran does not protect the Kentucky statute from pre-emption because the Kentucky statute does *not* "regulate the business of insurance." Pet. App. B at 47a.

3. *The Court of Appeals Decision.*

A divided panel of the court of appeals affirmed, concluding that Section 92 pre-empts Ky. Rev. Stat. 287.030(4) and that the Kentucky statute is not saved from pre-emption by Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), because it does *not* "regulat[e] the business of insurance." Pet. App. A at 9a-10a. The court of appeals reached this latter conclusion despite the fact that the licensing statute determines what kinds of insurance banks can sell and despite the fact the Ken-

[9] The Kentucky Bankers Association joined as a plaintiff and is a Respondent here. The Insurance Agents were permitted to intervene as defendants.

tucky Legislature has explained that the provision is designed to protect consumers from bank coercion. *See* House Resolution 91-SS-BR-63 (*reprinted in* Pet. App. H at 58a-59a). The dissent disagreed with the majority and, following *First Advantage* and the Eleventh Circuit's decision in *Barnett,* would have instead held that the McCarran-Ferguson Act does save the state law from pre-emption. Pet. App. A at 11a-25a (Batchelder, J., dissenting).

REASONS FOR GRANTING THE WRIT

I. THERE IS A SQUARE CONFLICT BETWEEN THE CIRCUITS AND INVOLVING A STATE COURT OF FINAL DECISION ON AN IMPORTANT QUESTION OF FEDERAL LAW.

Every court to consider the question has concluded that Section 92 does not "specifically relate to the business of insurance" under Section 2(b) of McCarran. *See* Pet. App. B at 46a, *aff'd on other grnds.*, Pet. App. A; *Barnett*, 839 F. Supp. at 841-42, *aff'd*, 43 F.3d at 637; *First Advantage*, 652 So. 2d at 573-74. There is complete uniformity on this point.

The conflict arises regarding the first inquiry under McCarran. The fundamental disagreement between the Louisiana state court and the Eleventh Circuit on the one hand and the Sixth Circuit on the other is whether state laws that exclude banks from being licensed to sell insurance are "enacted for the purpose of regulating the business of insurance." The Eleventh Circuit and the Louisiana state court squarely disagree with the Sixth Circuit both about whether such laws may be enacted "for the purpose of regulating the business of insurance" and about the proper test which should be applied to make this determination.[10]

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[10] The McCarran analysis is pertinent only if the federal and state laws at issue are in conflict. Applying a "traditional pre-

The Sixth Circuit majority, purporting to apply the standards developed by this Court in the course of construing McCarran's *antitrust* clause, *see Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982), flatly held that "[e]xcluding a person from participation in an activity [] is different from regulating the manner in which it is conducted." Pet. App. A at 9a.[11] Based on this holding, the majority concluded that *any* state law that prohibits a bank from being licensed to sell insurance *cannot* be a law enacted "for the purpose of regulating the business of insurance" within the meaning of McCarran. *Id.*

As Judge Batchelder admonished in her dissent, however, the *Pireno* test simply does not apply in the context of this case. Pet. App. A at 14a (Batchelder, J., dissenting). This Court's *Fabe* decision, and the inquiry articulated there, controls. *Id.* (citing *Fabe* and *Colonial Life and Accident Ins. Co. v. American Family Life Assurance Co.*, 846 F. Supp. 454, 459 (D.S.C. 1994)). *Pireno* applies solely to state laws threatened by federal anti-trust laws—inquiry under the second clause of McCarran, which is not at issue here. As the dissent explained, the *Fabe* Court "explicitly distinguished the first clause of § 2(b) [of McCarran] from the second clause, making it clear that the first clause 'is not so narrowly circumscribed' as the second clause of § 2(b)." Pet. App.

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emption analysis," the Sixth Circuit concluded that Section 92 and Ky. Rev. Stat. 287.030(4) are in conflict. Because the two provisions may be harmonized, however, the Sixth Circuit's conclusion is erroneous. Petitioners have identified this error as the basis of one of the Questions Presented in this case and intend to fully brief the issue should the case proceed to review on the merits.

[11] This view of the effect of Kentucky law is skewed—it does not *per se* prohibit banks from selling insurance; rather, it limits their sales to credit insurance. The law thus determines the *kinds* of insurance banks can sell.

A at 15a (Batchelder, J., dissenting). *See also Fabe*, 113 S.Ct. at 2210.

The Eleventh Circuit and the *First Advantage* court agreed with Judge Batchelder and applied the test developed by this Court in *Fabe* to reach a conclusion that squarely conflicts with the Sixth Circuit's determination that licensing restrictions cannot be considered as "regulating the business of insurance." Based on the factual record created before the trial court and state court case law interpreting the state law provision, the Eleventh Circuit concluded in *Barnett* that Florida's prohibition on bank licensure to sell insurance was enacted "for the purpose of regulating the business of insurance" because "it protects policyholders." *Barnett*, 43 F.3d at 635-36, Pet. App. J at 73a-74a. From this determination, the Eleventh Circuit concluded that, " '[u]nder the terms of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), therefore, federal law must yield to the extent the [state] statute furthers the interests of policyholders.' " *Id.* (quoting *Fabe*, 113 S.Ct. at 2208). The *First Advantage* court adopted the Eleventh Circuit's reasoning to conclude that a Louisiana bank insurance licensing prohibition also is protected from pre-emption by McCarran. *See First Advantage*, 652 So.2d at 572-76.

In dissent, Circuit Judge Batchelder argued that the majority should have done the same in this case. *See* Pet. App. A at 18a-19a (Batchelder, J., dissenting). As she concluded, "[W]hether a state chooses to regulate its insurance industry by prohibiting particular persons, entities, activities, or conduct—directly or indirectly—is immaterial. If the state aims to protect or regulate the insurer/insured relationship, it is regulating the business of insurance." *Id.* at 19a-20a (citing *SEC v. National Securities, Inc.*, 393 U.S. 453 (1969)). Thus, "[t]he proper standard to apply . . . is to examine whether the statute is centrally concerned with policyholders." *Id.* at 18a.

Applying the proper test—which the majority ignored —the dissent concluded that the Kentucky Legislature "intended to protect and regulate the relationship between the insurer and insured at its most basic level." *Id.* at 20a. By prohibiting banks from selling insurance, the Legislature meant to prevent potential policyholders from feeling coerced into purchasing insurance from the bank regardless of price or necessity. And by unduly influencing Kentucky citizens to purchase insurance from them, the banks could threaten the solvency of insurance companies—another important concern regarding the protection of policyholders' interests. *See id.*

The import of the majority's contrary conclusion—reached without any meaningful review of the purpose underlying the enactment of the Kentucky provision—is to impose a blanket rule to the effect that such state laws cannot be found to have been enacted for such a purpose. The Eleventh Circuit reached a contradictory conclusion only after conducting a complete review of the State of Florida's proffered purposes for enacting its licensing prohibition. The Eleventh Circuit utilized a carefully considered analysis consistent with this Court's precedents and the federal policies embodied in the McCarran-Ferguson Act. The Sixth Circuit did not.

II. RESOLUTION OF THIS SQUARE CONFLICT IS ESSENTIAL BUT THE *BARNETT* CASE PROVIDES THE BEST VEHICLE FOR THAT RESOLUTION.

As noted at the outset of this Petition, the laws of at least 15 States preclude national banks from selling insurance under Section 92 absent pre-emption. Unless this Court resolves the conflict, the two States located in the Sixth Circuit that have such laws (Kentucky and Tennessee) appear to be precluded from applying them while the one restrictive State located in the Eleventh Circuit (Florida) and the State of Louisiana will continue to enforce their prohibitions against national bank insurance sales. There

is no way to predict whether the other 11 States will be able to continue to enforce their prohibitions against national banks if challenged. A national bank in Connecticut already has initiated yet another action seeking a determination that the Connecticut prohibition on bank sales of insurance, as applied to national banks, is preempted by Section 92. *See Shawmut Bank Connecticut, N.A. v. Googins, et al.*, No. 3:94CV146(RNC) (U.S.D.C. D. Conn.). Other challenges will undoubtedly follow.

This Court cannot permit different standards to be applied to national banks in each of these cases merely by virtue of their location in different States,[12] nor can it condone the uncertainty that has been created for both national banks and state insurance commissioners throughout the country, by failing to resolve the conflict that now exists.

There is no reason to believe that further litigation on this issue will assist the Court in resolving the important issues presented. It would only sharpen the conflict and increase the uncertainty and confusion in the affected industries.

The *Barnett* case, however, provides the best vehicle for the Court to address this conflict. It is the only case in which a record regarding a State's purpose in enacting its licensing prohibition has been developed. It is therefore the only case in which the Court can fully examine the import of McCarran's "purpose" inquiry and adequately evaluate the Sixth Circuit's determination that State laws that preclude designated classes of persons or entities from being licensed to sell insurance are not—as a matter of law—enacted for the "purpose of regulating the business of insurance."

Moreover, Respondents here argued in the District Court that the Kentucky law at issue, as a matter of

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[12] Or to branches of the same national bank located in different States.

state law, does not prohibit them from selling insurance, and they intend to pursue that state law issue if this Court reverses the Sixth Circuit's holding. *Barnett* includes no such state law question, only the pure federal questions: pre-emption and McCarran. The Florida prohibitive law unquestionably applies to the national banks in that case. In part for this reason, the United States and the Comptroller of the Currency have filed a brief as *amici curiae* urging the Court to grant the petition for certiorari in *Barnett* and argue that *Barnett* is the better vehicle for resolution of the important issues presented in these cases.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully urge this Court to hold this petition pending final resolution of the *Barnett* case.

Respectfully submitted,

STEPHEN B. COX
Assistant General Counsel
Kentucky Department
of Insurance
229 West Main Street
P.O. Box 517
Frankfort, KY 40601
(502) 564-6037
Attorney for Petitioner
Commissioner of Insurance

ANN M. KAPPLER *
SCOTT A. SINDER
JENNER & BLOCK
601 Thirteenth Street, N.W.
Twelfth Floor
Washington, D.C. 20005
(202) 639-6000
Attorneys for the Insurance
Agent Petitioners

* Counsel of Record

July 13, 1995

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APPENDIX A

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

Nos. 92-6330, 92-6331

THE OWENSBORO NATIONAL BANK; THE FIRST NATIONAL BANK OF LOUISA; CITIZENS NATIONAL BANK OF PAINTSVILLE; KENTUCKY BANKERS ASSOCIATION,
Plaintiffs-Appellees,

UNITED STATES OF AMERICA
Intervening Plaintiff-Appellee,

v.

DON W. STEPHENS, Commissioner, Department of Insurance, Commonwealth of Kentucky
Defendant-Appellant (92-6330),

KENTUCKY STATE ASSOCIATION OF LIFE UNDERWRITERS; INDEPENDENT INSURANCE AGENTS OF KENTUCKY, INC.; KENTUCKY ASSOCIATION OF PROFESSIONAL INSURANCE AGENTS
Intervening Defendants-Appellants (92-6331).

Argued Sept. 29, 1994

Decided Dec. 29, 1994

Rehearing and Suggestion for Rehearing
En Banc Denied March 15, 1995

Before GUY and BATCHELDER, Circuit Judges; and McKEAGUE, District Judge.*

GUY, J., delivered the opinion of the court, in which McKEAGUE, D.J., joined.

BATCHELDER, J. (pp. 393-99), delivered a separate dissenting opinion.

RALPH B. GUY, Jr., Circuit Judge.

Defendants, the Commissioner of the Kentucky Department of Insurance ("Commissioner") and various Kentucky insurance industry associations, appeal the district court's grant of summary judgment in favor of plaintiffs, which are national banks doing business in Kentucky towns with populations of fewer than 5,000 persons. The district court concluded that a Kentucky statute that bars bank holding companies from acting as insurance agents was preempted by a federal statute that allows national banks operating in towns of fewer than 5,000 persons to act as insurance agents. On appeal, defendants argue that the Kentucky statute, Ky.Rev.Stat. Ann. § 287.030(4) ("section 287"), does not conflict with the federal statute, 12 U.S.C. § 92, and that, in any event, the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, and section 7 of the Bank Holding Companies Act, 12 U.S.C. § 1846, each "immunize" section 287 from preemption by § 92. We reject these arguments and affirm.

I.

In late 1990, plaintiffs submitted to the Commissioner requests for applications for licenses to act as life and general line insurance agents in Kentucky. The Commissioner denied these requests, but scheduled a hearing before a state administrative law judge ("ALJ") on the issue of whether section 287 barred plaintiffs from acting

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* Honorable David W. McKeague, United States District Court for the Western District of Michigan, sitting by designation.

as insurance agents. Before that hearing was held, however, plaintiffs filed this lawsuit, seeking declaratory and injunctive relief. A Kentucky state court thereafter granted plaintiffs' request for a stay of the administrative proceedings pending the outcome of this lawsuit. Meanwhile, a number of Kentucky insurance industry associations intervened on behalf of the Commissioner in this lawsuit. The United States intervened on behalf of plaintiffs. Defendants filed a motion to dismiss, arguing that the case was not justiciable because of the unfinished administrative proceeding before the ALJ. Plaintiffs then filed a motion for summary judgment, to which defendants responded by filing a cross-motion for summary judgment. In a published opinion, *see* 803 F.Supp. 24 (E.D.Ky. 1992), the district court determined that the case was justiciable,[1] granted plaintiffs' motion for summary judgment, and granted plaintiffs the relief they sought. This appeal followed.

II.

Defendants first argue that section 287 is not preempted by § 92 under conventional preemption analysis. Section 287 provides:

> No person who after July 13, 1984, owns or acquires more than one-half (½) of the capital stock of a bank shall act as insurance agent or broker with respect to any insurance except credit life insurance, credit health insurance, insurance of the interest of a real property mortgagee in mortgage property, other than title insurance.

Ky.Rev.Stat.Ann. § 287.030(4). Section 92 provides:

> In addition to the powers now vested by law in national banking associations organized under the laws of the United States any such association lo-

[1] Defendants have not raised any justiciability issues on appeal, and the district court appears to have decided them correctly.

> cated and doing business in any place the population of which does not exceed five thousand inhabitants as shown by the last preceding decennial census, *may*, under such rules and regulations as may be prescribed by the Comptroller of the Currency, *act as the agent for any fire, life, or other insurance company* authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company; *and may receive for services so rendered such fees or commissions as may be agreed upon between the said association and the insurance company for which it may act as agent: Provided, however,* That no such bank shall in any case assume or guarantee the payment of any premium on insurance policies issued through its agency by its principal: *And provided further,* That the bank shall not guarantee the truth of any statement made by an assured in filing his application for insurance.

12 U.S.C. § 92 (emphasis added).

It is well settled that "the Supremacy Clause, U.S. Const., Art. VI, cl. 2, invalidates state laws that 'interfere with, or are contrary to,' federal law." *Hillsborough County v. Automated Medical Labs.*, 471 U.S. 707, 712, 105 S.Ct. 2371, 2375, 85 L.Ed.2d 714 (1985). One of the ways in which a state law may "interfere" with a federal law is by coming into "actual[] conflict[]" with it, *i.e.*, by "stand[ing] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress[.]' " *Id.* at 713, 105 S.Ct. at 2375.

The Supreme Court has applied this "actual conflict" standard in cases with facts similar to those presented here. In *Franklin National Bank v. New York*, 347 U.S. 373, 74 S.Ct. 550, 98 L.Ed.2d 767 (1954), the Court considered whether a New York law that prohibited

use of the word "savings" in advertising for banks other than state-chartered savings banks was preempted by a federal law that authorized national banks "to receive deposits without qualification or limitation, and . . . [to] possess 'all such incidental powers as shall be necessary to carry on the business of banking[.]' " *Id.* at 376, 74 S.Ct. at 553. Although the federal law only implicitly permitted federal banks to use the word "savings" in their advertising, the Court concluded that there was "a clear conflict between the law of New York and the law of the Federal Government." *Id.* at 378, 74 S.Ct. at 554. Similarly, in *Fidelity Federal Savings and Loan Association v. de la Cuesta,* 458 U.S. 141, 102 S.Ct. 3014, 73 L.Ed.2d 664 (1982), the Court considered whether a California law that prohibited the inclusion of a due-on-sale clause in loan instruments was preempted by a federal regulation that expressly granted to federal savings and loans the power to include such clauses in loan instruments. Noting that the conflict between the state law and federal regulation did not "evaporate" because the "regulation simply permits, but does not compel, federal savings and loans to include due-on-sale clauses in their contracts[,]" *id.* at 155, 102 S.Ct. at 3023, the Court easily concluded that preemption was appropriate. *Id.* at 159, 102 S.Ct. at 3025.

The conflict between section 287 and § 92 is no different than those present in *Franklin National Bank* and *de la Cuesta.* For purposes of deciding the federal preemption issue only, the plaintiff national banks assumed as correct the Commissioner's position that section 287 applies not only to bank holding companies but also to subsidiaries thereof, such as national banks. Thus, while § 92 provides that national banks such as plaintiffs "may" act as insurance agents, section 287 provides that they "may not."

Seizing upon the permissive nature of the right created by § 92, however, defendants suggest that we should

"reconcile" the two sections by construing the right created by § 92 to be subject to state law restrictions such as section 287. That construction might be plausible if § 92 provided that certain national banks "*may have the power*" to act as insurance agents. But § 92 actually states that certain national banks "*may*, under such rules . . . as may be prescribed by the Comptroller of the Currency, *act as the agent for*" certain insurance companies. Providing that a bank "may act" is no different than providing that a bank "*shall have the power* to act." Thus, the language of § 92 does not permit the construction defendants advocate. That the power created by § 92 is permissive does not allow us to conclude that it does not exist.[2]

Defendants also contend that our construction of § 92 assumes that Congress acted with an "unconstitutional motive" in passing § 92, since the regulation of the business of insurance was understood to be beyond Congress's Commerce Clause powers when § 92 was passed in 1916. But § 92 in no way governs the manner in which the business of insurance is conducted; rather, it merely helps to define the powers of national banks. Congress has been understood to have the authority to define those powers since the Court's decision in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819), so we reject defendants' contention.

Finally, we note that section 287 interferes with the realization of a chief object of § 92. That object is to

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[2] The United States emphasizes that, in a 1990 letter to the Louisiana Commissioner of Insurance, the Chief Counsel of the Office of the Comptroller concluded that the right created by § 92 is not subject to state law restrictions. Because we reach the same conclusion without taking this letter into account, we need not determine whether such an informally expressed opinion is entitled to deference under the doctrine set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

increase the number of banks serving small towns by creating "additional sources of revenue" for such banks. Letter from Comptroller John Skelton Williams to Sen. Robert L. Owen, *reprinted in* 53 Cong.Rec. 11001 (1916). (App. at 159). Section 287 removes that source of revenue and thus "create[s] 'an obstacle to the accomplishment and execution of the *full* purposes and objectives [of Congress].'" *de la Cuesta*, 458 U.S. at 156, 102 S.Ct. at 3024 (emphasis added). Like the district court, we conclude that, under conventional preemption analysis, § 92 preempts section 287.

Defendants next argue that the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, "immunizes" section 287.030(4) from preemption by § 92. The relevant portion of the McCarran-Ferguson Act provides:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance. . . .

15 U.S.C. § 1012(b). Thus, section 287.030(4) is not preempted by § 92 if (1) section 287 was "enacted . . . for the purpose of regulating the business of insurance," and (2) § 92 does *not* "specifically relate[] to the business of insurance."

We first consider whether section 287 was "enacted . . . for the purpose of regulating the business of insurance." The "business of insurance" is made up of "practices" and "activities" that satisfy the criteria set forth in *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119, 102 S.Ct. 3002, 73 L.Ed.2d 647 (1982). Those criteria are:

> *first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*,

> whether the practice is an integral part of the policy relationship between the insurer and insured; and *third,* whether the practice is limited to entities within the insurance industry.

Id. at 129, 102 S.Ct. at 3009.

Citing *United States Department of Treasury v. Fabe,* —— U.S. ——, 113 S.Ct. 2202, 124 L.Ed.2d 449 (1993), however, defendants contend that the *Pireno* criteria are "not applicable" to the determination of whether a state law was "enacted . . . for the purpose of regulating the business of insurance." (Defendants' Brief at 24 n.22.) We disagree. It is true that *Pireno* addressed the scope of the antitrust immunity arising under the second clause of § 1012(b). That clause provides an exemption from federal antitrust laws for activities that (1) are regulated by state law and (2) qualify as the "business of insurance." *See* 15 U.S.C. § 1012(b). Thus, "the first clause [of § 1012(b)] commits laws 'enacted . . . for the purpose of regulating the business of insurance' to the States, while the second clause exempts only 'the business of insurance' itself from the antitrust laws." *Fabe,* —— U.S. at ——, 113 S.Ct. at 2209. Whether a particular activity is part of the "business of insurance" is, of course, a separate question from whether a state law was "enacted . . . for the purpose of regulating the business of insurance." The *Fabe* Court accordingly noted that the latter question cannot be answered by reference to the *Pireno* criteria alone. But that does not mean those criteria simply are "not applicable" in cases involving the first clause of § 1012(b). If, in such a case, the issue arises of whether a particular activity is part of the "business of insurance," the *Pireno* criteria apply. *See Fabe,* —— U.S. at ——, 113 S.Ct. at 2208 (noting, in considering claim that arose under first clause of § 1012(b), that *Pireno* "identified the three criteria . . . that *are* relevant in determining what activities consti-

tute the 'business of insurance.' ") (emphasis added). In short, the *Fabe* Court merely noted that the scope of the respective immunities created by the first and second clauses of § 1012(b) are different; it assuredly did not give "business of insurance" one meaning in the first clause and a different meaning in the second.

The *Fabe* Court went on to hold that "[t]he broad category of laws enacted 'for the purpose of regulating the business of insurance' consists of laws that possess the 'end, intention, or aim' of adjusting, managing, or controlling the business of insurance." —— U.S. at ——, 113 S.Ct. at 2210. Thus, to have been "enacted . . . for the purpose of regulating the business of insurance," section 287 must possess the aim of regulating activities that meet the *Pireno* criteria.

Section 287 does not possess such an aim. That section helps to define the powers of Kentucky bank holding companies by excluding such companies from participation in the activities that constitute the "business of insurance." Excluding a person from participation in an activity, however, is different from regulating the manner in which that activity is conducted. The former is the regulation of the person; the latter is the regulation of the activity. Section 287 only regulates persons owning "more than one-half (½) of the capital stock of a bank"; it in no way governs the manner in which the activities constituting the "business of insurance" are conducted. Section 287 thus is different in kind from the Ohio statute that was found to regulate the business of insurance in *Fabe*, since the Ohio statute set standards for "the actual performance of an insurance contract." —— U.S. at ——, 113 S.Ct. at 2210. *See also United Servs. Auto. Ass'n v. Muir*, 792 F.2d 356, 364 (3rd Cir. 1986) (state law forbidding banks from being licensed as insurers "ha[d] no part in the business of insurance under McCarran-Ferguson"); *but see SEC v. National Securities, Inc.*, 393 U.S. 453, 460, 89 S.Ct. 564, 568, 21

L.Ed.2d 668 (1969) (stating in dicta that state laws governing "the licensing of [insurance] companies and their agents . . . [are] within the scope of" McCarran-Ferguson).

Since we conclude that section 287 was enacted for the purpose of regulating certain conduct by bank holding companies, not the business of insurance, we need not consider whether § 92 "specifically relates to the business of insurance"; for, without regard to whether § 92 so relates, McCarran-Ferguson cannot save section 287 from preemption.

Defendants' remaining argument is that section 287 cannot be preempted by § 92 because "section 7 of the Bank Holding Company Act [12 U.S.C. § 1846] expressly reserves to the Commonwealth the authority to regulate bank holding companies, and their subsidiaries, through state regulation such as [section 287]." (Defendants' Brief at 28.) In making this argument, defendants ignore the plain language of § 1846, which provides:

> No provision *of this chapter* shall be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to companies, banks, bank holding companies, and subsidiaries thereof.

12 U.S.C. § 1846 (emphasis added). Here, § 92 is the provision that prevents Kentucky from exercising the power to enforce section 287. Section 92 is found in chapter 2 of title 12, while § 1846 is found in chapter 17 of that title. Since § 92 is a provision of a chapter other than the chapter in which § 1846 is found, § 92 may be construed to prevent Kentucky from exercising the power to enforce section 287. Section 1846 simply is irrelevant to this case.

AFFIRMED.

BATCHELDER, Circuit Judge, dissenting.

I disagree with the majority's decision affirming the district court in granting summary judgment and injunctive relief for the plaintiffs. Therefore, I respectfully dissent from the Court's opinion.

I.

Defendants-Appellants present three central arguments in this appeal: (1) that Kentucky Revised Code § 287.030(4) ("section 287") is not preempted by 12 U.S.C. § 92 under traditional preemption analysis; (2) that the McCarran-Ferguson Act protects section 287 from preemption by § 92; and (3) that section 287 cannot be preempted by § 92 because of language contained in the Bank Holding Company Act (BHCA).

I agree with the majority's analysis of the first and third issues raised by the defendants. I respectfully disagree, however, with the majority's opinion on the issue of McCarran-Ferguson preemption. It is my belief that the McCarran-Ferguson Act does, in fact, shield the state statute, section 287, from preemption by the federal statute, § 92.

II.

As the majority accurately states, the McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (referred to hereafter as § 2(b)), protects section 287 from preemption by § 92 if two factors are satisfied. First, the state statute, section 287, must have been "enacted . . . for the purpose of regulating the business of insurance." McCarran-Ferguson § 2(b). Second, the federal statute, § 92, must *not* "specifically relate[] to the business of insurance." *Id.* If both of these requirements are met, the state statute will not be preempted by the federal statute.

In this case, I believe both factors have been satisfied. First, section 287 was clearly enacted by the Kentucky

legislature to regulate the business of insurance. Second, § 92 does not specifically relate to the business of insurance.

A. McCarran-Ferguson

The McCarran-Ferguson Act was enacted by Congress in 1945 in response to the Supreme Court's decision in *United States v. South-Eastern Underwriters Ass'n,* 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944). In *South-Eastern Underwriters,* the Court held that regulation of interstate insurance activity was within the Commerce Clause power of Congress. *Id.* at 553, 64 S.Ct. at 1173. Congress responded adversely to the Court's decision, immediately enacting McCarran-Ferguson "to assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation." *Securities and Exchange Comm'n v. National Secs., Inc.,* 393 U.S. 453, 459, 89 S.Ct. 564, 568, 21 L.Ed.2d 668 (1969).

Consistent with its view that the business of insurance is " 'a local matter, to be subject to and regulated by the laws of the several States,' " Congress explicitly intended the McCarran-Ferguson Act to restore state taxing and regulatory powers over the insurance business to their pre-*South-Eastern Underwriters* scope. *Western and Southern Life Ins. Co. v. State Bd. of Equalization,* 451 U.S. 648, 654, 101 S.Ct. 2070, 2075, 68 L.Ed.2d 514 (1981) (citing H.R.Rep. No. 143, 79th Cong., 1st Sess. 2 (1945)). Undeniably, the purpose of the McCarran-Ferguson Act was to "give support to the existing and future state systems for regulating and taxing the business of insurance." *Prudential Ins. Co. v. Benjamin,* 328 U.S. 408, 429, 66 S.Ct. 1142, 1155, 90 L.Ed. 1342 (1946).

Clearly, Article I, Section 8 of the United States Constitution grants Congress the power to regulate interstate commerce, including interstate insurance, if it so chooses.

U.S. Const., Art. I, § 8, cl. 3; *see also South-Eastern Underwriters,* 322 U.S. at 539-45, 64 S.Ct. at 1166-69. It is nonetheless true that Congress may limit its own Commerce Clause power to grant the states "an ability to restrict the flow of interstate commerce that they would not otherwise enjoy." *Lewis v. BT Inv. Managers, Inc.,* 447 U.S. 27, 44, 100 S.Ct. 2009, 2020, 64 L.Ed.2d 702 (1980). The enactment of the McCarran-Ferguson Act represents such a situation in which, once the Supreme Court held that the regulation of interstate insurance was within Congress's commerce power, Congress exercised its plenary power by enacting McCarran-Ferguson to limit its own power by providing for regulation by the states instead.

B. Kentucky Section 287

Section 287.030(4) of the Kentucky Revised Code purports to prevent state or national banks from selling any insurance other than those narrow categories permitted by the statute. The applicable language of the statute reads:

> (4) No person who after July 13, 1984, owns or acquires more than one-half (½) of the capital stock of a bank shall act as insurance agent or broker with respect to any insurance except credit life insurance, credit health insurance, insurance of the interest of real property mortgagee in mortgaged property, other than title insurance.

Ky.Rev.Stat.Ann. § 287.030 (Baldwin 1987). In a 1970 opinion, the Kentucky Attorney General determined that the provision applied to state banks as well as national banks doing business in Kentucky. Ky.Op.Att'y Gen. 70-643 (1970).

Defendants contend that section 287 "falls squarely" within § 2(b)'s requirement that a state statute be enacted to regulate the business of insurance to escape preemp-

tion by federal law. The district court found, to the contrary, that the Kentucky statute was not enacted to regulate the business of insurance. *Owensboro Nat'l Bank v. Moore,* 803 F.Supp. 24, 36 (E.D.Ky.1992). The district court's holding was based in part on the location of section 287 in the chapter of the Kentucky Revised Statutes regulating banks and trust companies. The lower court also based its decision on the three-part test set out in *Union Labor Life Ins. Co. v. Pireno,* 458 U.S. 119, 102 S.Ct. 3002, 73 L.Ed.2d 647 (1982). In its opinion, the majority also relied upon *Pireno* to determine what activities constitute the "business of insurance."

I respectfully disagree that the *Pireno* factors apply to this case. Rather, I believe that the defendants are correct that the Supreme Court's recent opinion in *United States Department of Treasury v. Fabe,* —— U.S. ——, 113 S.Ct. 2202, 124 L.Ed.2d 449 (1993), sets the controlling criteria in this case. *See also Colonial Life and Accident Ins. Co. v. American Family Life Assurance Co.,* 846 F.Supp. 454, 459 (D.S.C.1994) ("while . . . the *Pireno* criteria are relevant in determining the applicability vel non of the antitrust exemption, they are not determinative with respect to the first clause of Section 2(b)").

C. Fabe *and the application of § 2(b)*

In *Fabe,* the Court held that an Ohio priority statute was saved from federal preemption to the extent that it regulated the relationship between an insurance company and its policyholders. *Fabe,* —— U.S. at ——, 113 S.Ct. at 2208. The Court, in its analysis, made an important distinction between the first and second clauses of § 2(b). According to the Court, the first clause deals with those state laws (such as section 287) enacted for the purpose of regulating insurance. The clause saves applicable state laws from federal preemption. The second clause, however, exempts from preemption "only 'the business of in-

surance' itself from the *antitrust laws.*" *Fabe,* —— U.S. at ——, 113 S.Ct. at 2209 (quoting § 2(b) of McCarran-Ferguson) (emphasis added).

Thus, the *Fabe* Court explicitly distinguished the first clause of § 2(b) from the second clause, making it clear that the first clause "is not so narrowly circumscribed" as the second clause of § 2(b). *Id.* As the Court stated,

> The language of § 2(b) is unambiguous: the first clause commits laws "enacted . . . for the purpose of regulating the business of insurance" to the States, while the second clause exempts only "the business of insurance" itself from the antitrust laws. To equate laws "enacted . . . for the purpose of regulating the business of insurance" with the "business of insurance" itself, as petitioner urges us to do, would be to read words out of the statute. This we refuse to do.

Id. at ——, 113 S.Ct. at 2209-10 (footnote omitted).

The Court further disputed the allegation that it was violating a " 'basic rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning'." *Fabe,* —— U.S. at —— n. 6, 113 S.Ct. at 2210 n. 6. According to the Court, "[t]his argument might be plausible if the two clauses actually employed identical language." *Id.* As the Court illustrated, however, the two clauses do not use identical language, rather "the first clause contains the word 'purpose,' a term that is significantly missing from the second clause." *Id.* Failure to distinguish the first clause of § 2(b) from the second clause therefore "overlooks another maxim of statutory construction: 'that a court should "give effect, if possible, to every clause and word of a statute." ' " *Id.* (citations omitted). Therefore, the majority here cannot justify its failure to distinguish between the two parts of § 2(b) by "assur[ing]" us that

the "business of insurance has only one meaning. Maj. opinion at pp. 391-92.

Clearly, the first clause applies to a broader category of laws than the second clause. However the Court did more than "merely note" that the scope of the first and second clause of § 2(b) are "different," as the majority described the holding of *Fabe*. Maj. opinion at pp. 391-92. Rather, the *Fabe* Court described the first clause as applicable to "laws that possess the 'end, intention, or aim' of adjusting, managing, or controlling the business of insurance." *Id.* at ——, 113 S.Ct. at 2210 (citation omitted). "This category necessarily encompasses more than just the 'business of insurance.'" *Id.*

Several prominent cases before *Fabe* dealt with the "business of insurance" within the meaning of the second clause of § 2(b). *See Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 102 S.Ct. 3002, 73 L.Ed.2d 647 (1982); *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 99 S.Ct. 1067, 59 L.Ed.2d 261 (1979). A tripartite test [1] consequently developed out of these cases when the second clause of § 2(b) was at issue. The district court in the case at hand understandably relied on *Pireno*'s tripartite test because *Fabe* had not yet been decided. In light of *Fabe*, however, I believe that both the district court's and the majority's reliance on *Pireno* is misplaced. For example, the majority relied on language from *Fabe* "that *Pireno* 'identified the three criteria . . . that are relevant in determining what activities consti-

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[1] Pursuant to *Pireno*'s tripartite test, the "business of insurance" under the second clause of § 2(b), is determined by considering the following:

> [F]irst, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry.

Pireno, 458 U.S. at 129, 102 S.Ct. at 3009.

tute the "business of insurance" ' " Maj. opinion at p. 392 (quoting *Fabe*, —— U.S. at ——, 113 S.Ct. at 2208). However, this quotation appeared in the *Fabe* Court's presentation of the issues, *before* the Court actually analyzed *Pireno* and distinguished it from the Ohio statute then being considered. In its subsequent analysis of *Pireno*, the Court clearly limited the scope and application of *Pireno*'s tripartite test stating: *"Pireno* and *Royal Drug* held *only* that 'ancillary activities' that do not affect performance of the insurance contract or enforcement of contractual obligations do not enjoy the antitrust exemption for laws regulating the 'business of insurance.' " *Fabe*, —— U.S. at ——, 113 S.Ct. at 2209 (quoting *Pireno*, 458 U.S. at 134 n. 8, 102 S.Ct. at 3011 n. 8) (emphasis added). Furthermore, the Court distinguished the Ohio statute from *Pireno* stating that *Pireno* should "not [be] read . . . to suggest that the business of insurance is confined entirely to the writing of insurance contracts, as opposed to their performance." *Id.*

D. McCarran-Ferguson Analysis—First Clause of § 2(b)

After the *Fabe* Court distinguished the first and second clauses of § 2(b) from one another, it further examined the history of McCarran-Ferguson to determine Congress's intent in drafting the first clause of § 2(b). Congress's reaction to the Supreme Court decision in *South-Eastern Underwriters* arose in part from its concern with the nature of the insurance contract. In enacting McCarran-Ferguson, Congress intended for the contract between an insurer and its policyholder to be controlled and regulated by the state. The legislation was aimed at:

> The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the "business of insurance." Undoubtedly, other activities of insurance companies relate so closely to

> their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly are laws regulating the "business of insurance."

Securities and Exch. Comm'n v. National Secs., Inc., 393 U.S. 453, 460, 89 S.Ct. 564, 568-69, 21 L.Ed.2d 668 (1969).

1. Section 287: Enacted to Regulate the Business of Insurance

The proper standard to apply, therefore, when determining whether the Kentucky statute at issue falls within the intended scope of McCarran-Ferguson, is to examine whether the statute is centrally concerned with policyholders. Defendants allege that section 287 was enacted to regulate the business of insurance. According to *Fabe*, this means the statute must have been enacted to protect or regulate the relationship between the insurer and the policyholder.

According to the majority, section 287 merely regulates a group of people which it intended to prevent from entering the insurance industry. Such exclusion of a person from participation in an activity is not viewed by the majority as regulation of the activity itself. I do not agree with this concept.

The only other federal court to address this issue recently examined a Florida statute that prevented insurance agents associated in any way with a financial institution from engaging in insurance agency activities. *Barnett Banks v. Gallagher*, 839 F.Supp. 835 (M.D. Fla.1993). The Florida statute and section 287 therefore achieve the

same goal—to prevent banks from selling general insurance —by slightly different means. Florida's statute restricted the activities of insurance agents while Kentucky's section 287 restricts the activities of bank holding companies. Like section 287, the Florida statute regulates a particular group of people by prohibiting them from entering the insurance industry. Unlike the majority in the case at hand, however, the court in *Barnett Banks* gauged the "larger intent" of the Florida statute and found the law was enacted to "further[] the interests' of the potential policyholding public, [to] regulate[] the potential policyholding public and, therefore, [was] a 'law enacted for the purpose of regulating the business of insurance' within the meaning of McCarran-Ferguson." *Barnett Banks,* 839 F.Supp. at 840-41 (quoting *Fabe* and § 2(b) of McCarran-Ferguson).

Even *if* the majority is correct in distinguishing statutes that regulate persons from those that regulate the manner in which an activity is conducted, it improperly fails to consider whether section 287 regulates the business of insurance indirectly. When Congress enacted the McCarran-Ferguson Act, it envisioned the "business of insurance" to focus upon those statutes "aimed at protecting or regulating [the relationship between insurer and policyholder], directly or *indirectly* . . . ." *National Secs.,* 393 U.S. at 460, 89 S.Ct. at 569 (emphasis added). Therefore, it is sufficient for the Kentucky legislature to indirectly govern the relationship between an insurance company and future policyholders by enacting a statute such as section 287 to regulate those persons the state wishes to exclude from the insurance industry. *See also Hoylake Inv. Ltd. v. Washburn,* 723 F.Supp. 42 (N.D.Ill.1989) (finding that an Illinois statute regulated the policyholder relationship in part because of the state's concern for the future solvency of its insurance companies). Whether a state chooses to regulate its insurance industry by prohibiting particular persons, entities, activities, or conduct—

directly or indirectly—is immaterial. If the state aims to protect or regulate the insurer/insured relationship, it is regulating the business of insurance. *National Secs.*, 393 U.S. at 460, 89 S.Ct. at 569.

By enacting section 287, the Kentucky legislature likewise intended to protect and regulate the relationship between insurer and insured at its most basic level. In a 1981 Advisory Opinion the Kentucky Attorney General outlined the amendments which led to section 287 and stated that it was "the clear intent of the legislature to limit the involvement of majority bank shareholders, including one-bank holding companies, in insurance related activities." Ky.Op.Att'y Gen. 81-173 (1981). Later, a Kentucky House Resolution stated: "if banks were licensed to sell homeowners, automobile, and other lines of insurance, the consumer could feel coerced into purchasing insurance from the bank to obtain the loan regardless of the insurance premium." Ky.H.R. 91-SS-BR-198 (1991). The legislature enacted the statute out of a direct concern for future policyholders. It cannot be disputed, therefore, that section 287 was aimed to protect the insurance relationship between insurers and policyholders.

Obviously, the Kentucky legislature was concerned that if banks, national or state, were able to sell general insurance to their customers, the banks could unduly influence those Kentucky citizens and jeopardize the ability to pay claims when demands were made. *See Barnett Banks*, 839 F.Supp. at 840. The state has an important interest in protecting its citizens by insuring that insurance companies remain solvent. *Id.* In an effort to protect the interests of its citizens, the Kentucky legislature should not be so constrained that all legislation intended to regulate the insurance industry, " 'directly or indirectly,' " must be located only within its Insurance Code. *National Secs.*, 393 U.S. at 460, 89 S.Ct. at 569.

The district court in the case at hand also was persuaded by plaintiffs' argument that section 287 does not regulate the business of insurance because it is not contained within Kentucky's Insurance Code, and is thus primarily intended to regulate bank holding companies rather than insurance. As the Supreme Court has said on this issue, however, " 'mere matters of form need not detain us.' " *Fabe*, —— U.S. at ——, 113 S.Ct. at 2210 (quoting *National Secs.*, 393 U.S. at 460, 89 S.Ct. at 568). It is not enough to state baldly that because the particular statute does not fall directly within the Insurance Code, it does not regulate the business of insurance. "Instead, the Court must attempt to gauge the larger intent and design" of section 287. *Barnett Banks*, 839 F.Supp. at 840.

Accordingly, it is enough that a state undertakes to regulate insurance generally for a specific statute or practice to fall within the meaning of McCarran-Ferguson. *McIlhenny v. American Title Ins. Co.*, 418 F.Supp. 364, 369 (E.D.Pa.1976). It is well-established that the McCarran-Ferguson Act's "state regulation" requirement is satisfied by the general undertaking by a state to regulate the insurance industry. *See Federal Trade Comm'n v. National Casualty Co.*, 357 U.S. 560, 78 S.Ct. 1260, 2 L.Ed.2d 1540 (1958); *Ohio AFL-CIO v. Insurance Rating Bd.*, 451 F.2d 1178 (6th Cir.1971), *cert. denied*, 409 U.S. 917, 93 S.Ct. 215, 34 L.Ed.2d 180 (1972). As illustrated by another circuit: "State power to regulate necessarily includes the discretion to prohibit, permit, or limit insurance practices as the state sees fit." *Dexter Equitable Life Assurance Soc'y*, 527 F.2d 233, 236 (2d Cir.1975).

It is my opinion, therefore, that the district court erred in its holding. Contrary to the majority's opinion, I believe that section 287 was enacted to regulate the business of insurance.

2. *Section 92: Not Specifically Related to the Business of Insurance*

The second step in this McCarran-Ferguson analysis is to determine whether § 92 "specifically relates to the business of insurance." McCarran-Ferguson § 2(b). Because it decided that section 287 was not enacted to regulate the business of insurance, the majority declined to consider this issue. However, there is little doubt that, as the district court determined below, § 92 does *not* specifically relate to the business of insurance. *Owensboro Nat'l Bank*, 803 F.Supp. at 34-35. Rather, § 92's "primary intent was to strengthen small national banks by providing them with an additional source of revenue." *Id.* (citations omitted). As the district court further stated, the mere fact that "the power granted to the national banks involves insurance does not transform this section into a regulation of the business of insurance." *Id.* at 36. On this issue, the district court's analysis is sound and should be followed by this Court.

The plaintiffs maintain, however, that § 92 does specifically regulate the business of insurance. The Supreme Court has not been explicitly clear how "specific" a federal statute must be to preempt a state law which regulates the business of insurance. The *Fabe* Court came the closest to a firm definition of determining that McCarran-Ferguson calls for a "clear statement rule." *Fabe*, —— U.S. at ——, 113 S.Ct. at 2211. According to this rule, a federal statute such as § 92 must "clearly state" that it regulates the business of insurance or otherwise intends to preempt a contrary state law. *Id.* Upon examining the legislative history of McCarran-Ferguson, the Court found that only when "Congress, in its wisdom, [acted] specifically with reference to insurance in enacting the law" would such a law preempt any state statute enacted to regulate the busines of insurance. *Id.* at —— n. 7, 113 S.Ct. at 2211 n. 7. Therefore, " 'no existing law and no future law should, by mere implication, be

applied to the business of insurance.'" *Id.* (quoting 91 Cong.Rec. 1487 (1945)).

The context of § 92 has always been within the regulation of banking rather than insurance. In *United States Nat'l Bank of Oregon v. Independent Insurance Agents of America*, —— U.S. ——, 113 S.Ct. 2173, 124 L.Ed. 2d 402 (1993), in which the Court upheld the viability of § 92, the Court emphasized that § 92 was part of the Federal Reserve Act. *Id.* at ——, 113 S.Ct. at 2182. The court in *Barnett Banks* relied on the language of *Independent Agents* stating that § 92 was to be read in context with the other paragraphs around it and the fact that neither the *Independent Ins. Agents* Court nor Congress ever suggested that § 92 was specifically related to the business of insurance. Therefore, § 92 was found not to specifically relate to the business of insurance. *Barnett Banks*, 839 F.Supp. at 843.

Furthermore, no party has cited to any case in support of the contention that § 92 specifically relates to the business of insurance. The banks point to several cases in which other federal statutes were found to "specifically relate to the business of insurance" within the context of McCarran-Ferguson. None of these cases, however, is persuasive or applicable to the issue in this case. In *Hanover Ins. Co. v. Commissioner of Internal Revenue*, 598 F.2d 1211 (1st Cir.), *cert. denied*, 444 U.S. 915, 100 S.Ct. 229, 62 L.Ed.2d 169 (1979), the statute at issue was an Internal Revenue Service provision dealing exclusively with the taxation of insurance companies. Partially because of the exclusive insurance nature of the statute and partially because the power of federal taxation was not delegated to the states in this instance, *Hanover* is not persuasive here.

In *Texas Employers' Ins. Ass'n v. Jackson*, 820 F.2d 1406 (5th Cir.1987), *cert. denied*, 490 U.S. 1035, 109 S.Ct. 1932, 104 L.Ed.2d 404 (1989), the statute at issue was the Longshore and Harbor Workers Compensa-

tion Act (LHWCA). Again, the court in *Jackson* found overwhelming evidence within the language of the statute and its regulations to prove a pervasive regulation of the business of insurance. A similar pervasive intent to regulate the insurance business is not evident in § 92.

In *Hewlett-Packard Co. v. Barnes,* 571 F.2d 502 (9th Cir.), *cert. denied,* 439 U.S. 831, 99 S.Ct. 108, 58 L.Ed. 2d 125 (1978), an ERISA provision was at issue. Once again, however, regulation of the business of insurance pervades ERISA. Not only have numerous courts agreed that ERISA specifically relates to the business of insurance, ERISA's "deemer" clause explicitly exempts state employee benefit plans from the preemption language of McCarran-Ferguson.

Finally, plaintiffs and an amicus brief from the American Bankers Association argue that if section 287 is found to regulate the business of insurance, then § 92 must also be found to specifically relate to the business of insurance. According to plaintiffs, common sense dictates that the definition of § 2(b)'s "business of insurance" be applied equally to both Kentucky's section 287 and § 92. The plaintiffs' argument is flawed, however, in its disregard for the exact wording of the statute. *See supra* subsection II.C. Section 2(b) states that a federal statute must "specifically relate[] to the business of insurance." Although this phrase is not clearly defined, the Court in *Fabe* termed it a "clear statement rule." *Fabe,* —— U.S. at ——, 113 S.Ct. at 2211. It is apparent from the *Fabe* decision that an analysis of the first clause of § 2(b) requires a broader standard for the state statute at issue than for the federal statute at issue. Furthermore, cases such as *Fabe* reach the very result contested by plaintiffs—that a state statute can be found to regulate the business of insurance without also finding that the federal statute specifically relates to the business of insurance.

III.

Consequently, I would find that McCarran-Ferguson prevents federal presumption of section 287 and I would reverse and remand on that basis.

APPENDIX B

UNITED STATES DISTRICT COURT
E.D. KENTUCKY
AT FRANKFORT

Civ. A. No. 91-3

THE OWENSBORO NATIONAL BANK, *et al.*,
Plaintiffs,

and

UNITED STATES OF AMERICA,
Intervening Plaintiff,

v.

RONNIE C. MOORE, Commissioner,
Defendant,

and

KENTUCKY STATE ASSOCIATION OF
LIFE UNDERWRITERS, *et al.*,
Defendants.

Aug. 4, 1992

MEMORANDUM OPINION AND ORDER

HOOD, District Judge.

This matter is before the court upon several pending motions. The defendant, Ronnie C. Moore, the Commissioner of the Kentucky Department of Insurance (the

Commissioner), has moved to dismiss the complaint. [Record #4]. The intervening defendants (collectively referred to as "the associations") have also filed a motion to dismiss. [Record #7]. The plaintiffs have moved for summary judgment, [Record #14], as have the Commissioner and the associations. [Record #28]. Finally, the United States has moved for summary judgment on its intervening complaint. [Record #60]. These motions have been fully briefed and argued to the court, and this matter is ready for consideration.

I. FACTUAL BACKGROUND

The underlying facts of this case are undisputed. The plaintiff banks are national banking associations organized under the laws of the United States. Two of the plaintiffs, The First National Bank of Louisa, and Citizens National Bank of Paintsville are located in Kentucky towns with less than 5,000 inhabitants, as shown by the 1990 Decennial Census. The other banking plaintiff, The Owensboro National Bank, maintains a branch in Whitesville, Kentucky, which also has a 1990 population of less than 5,000 persons. Each plaintiff bank is owned by a bank holding company.

In the fall of 1990, the plaintiff banks communicated to the Commissioner their wish to apply for licenses to act as general lines and life insurance agents. Responding by letter dated January 10, 1991, the Commissioner declined to immediately provide the requested applications, stating that "such a dramatic change in our long-standing interpretation of both statutory and case law should not be lightly granted." Letter from Commissioner Elizabeth Wright to M. Brooks Senn (January 10, 1991) [Record #16, Tab 6]. Rather, the Commissioner scheduled a public hearing for February 13, 1991, to determine "whether or not the Kentucky Department of Insurance shall issue the insurance agents licenses requested . . . upon completion of the applicable licensing proce-

dures as set forth in KRS 304, Subtitle 9. . . ." [Record #30, Tab 2].

On January 24, 1991, the plaintiffs filed the present action in this court seeking a declaration of rights and injunctive relief. [Record #1]. Specifically, the plaintiffs asked this court to require the Commissioner's compliance with 12 U.S.C. § 92, which purportedly permits national banks having an office in towns with less than 5,000 inhabitants to act as insurance agents.

The day prior to filing suit, one of the plaintiffs, the Kentucky Bankers Association (the KBA), apparently distributed a memorandum to its members stating that the Commissioner's hearing "could prove to be a circus", and may be "nothing more than a 'name-calling' session." Memorandum from Ballard W. Cassidy, Jr. to KBA Members (January 23, 1991) [Record #5, Exhibit C]. The KBA urged its members not to attend the hearing. Nevertheless, the plaintiffs did attend, but called no witnesses. Rather, they submitted written objections to the hearing itself, and restated their legal arguments.

No resolution was attained at the hearing, and the hearing officer permitted the Commissioner to engage in limited discovery, over plaintiffs' objections. [Record #11, Tabs 5 & 6]. The hearing was recessed until April 8, 1991, and at that time additional evidence was presented by the Commissioner. No final action ever resulted from the hearing, and further proceedings in the Department of Insurance were eventually stayed, pending the outcome of this litigation, by order of the Franklin Circuit Court. [Record #24, Exhibit 1].

This matter has been submitted to this court on cross-motions for summary judgment, and the parties have presented arguments on those motions. However, the Commissioner and the associations have asserted that this court does not have subject matter jurisdiction over this action. That assertion must be addressed prior to any consideration of the motions for summary judgment.

II. JUSTICIABILITY

The Commissioner and the associations raise several arguments in support of their contention that this court lacks subject matter jurisdiction. They contend that this matter is not ripe for decision as no final action has been taken by the Commissioner. They further assert that the plaintiffs have not exhausted their state remedies. Finally, they argue that this court should abstain from adjudicating this action because to do so would interfere with ongoing state proceedings, and because the plaintiffs' claims raise unsettled questions of state law.

A. RIPENESS

This court is limited to the adjudication of actual cases or controversies. U.S. Const. art. III, § 2. For this court to exercise jurisdiction over this case, it must be ripe for decision. The doctrine of ripeness "dictates that the courts should decide only existing, substantial controversies, not hypothetical questions or possibilities." *City Communications, Inc. v. City of Detroit*, 888 F.2d 1081, 1089 (6th Cir.1989). In the context of administrative action, this doctrine prevents courts from becoming involved in disagreements over administrative policies and protects agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681 (1967).

Here, the Commissioner and the associations argue that because the Department of Insurance was not permitted to complete its administrative process before this suit was filed, the dispute is not ripe for decision. It is true that this action was filed on January 24, 1991, after the plaintiffs received notice of the public hearing on their request for applications, but before the hearing was held. However, as will be seen in detail later, the Commonwealth of Kentucky, acting through its Attorney General and/or the Commissioner, has long taken the position

that the plaintiff banks are not authorized to act as insurance agents in Kentucky.

In addressing the issue of ripeness, the court is persuaded by the reasoning of the Supreme Court in *Columbia Broadcasting System v. United States,* 316 U.S. 407, 62 S.Ct. 1194, 86 L.Ed. 1563 (1942). In *CBS*, the Federal Communications Commission had issued a regulation which would have prevented the issuance of radio licenses to stations which signed network affiliation contracts with certain provisions. Although no license had been revoked and the FCC had not refused to grant any license based upon the regulation, the Court held that a challenge to the regulation was ripe. The court specifically noted that the FCC action was no less reviewable because promulgation of the regulation itself did not deny or cancel a license. It was enough that failure to comply with the regulation would penalize the licensees, and ultimately CBS, the contracting network. *Id.*, at 417, 62 S.Ct., at 1200; *see also United States v. Storer Broadcasting Co.*, 351 U.S. 192, 76 S.Ct. 763, 100 L.Ed. 1081 (1956).

The present situation is similar. Although the Commissioner has not taken final action with respect to the plaintiff banks' requests for applications, his longstanding view of the questions involved constitute action which is sufficiently final to concretely affect the plaintiffs interests. This view is amply supported by the aggressive stance the Commissioner has taken in this litigation in setting forth his view of both federal and state law in this area and the interaction between both spheres. Ripeness is now viewed as a matter of common sense, and the court is convinced that absolutely no purpose would be served by permitting the Commissioner to continue with his charade of evaluation before this court addresses the merits of this litigation. *See McCoy-Elkhorn Coal Corp. v. United States Environmental Protection Agency*, 622 F.2d 260, 264 (6th Cir. 1980).

This decision comports with the Supreme Court's two part ripeness test articulated in *Abbott Laboratories.*

There the Court determined that ripeness depends upon both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. *Abbott Laboratories*, 387 U.S., at 149, 87 S.Ct., at 1515. This action presents purely legal questions which are fit for judicial decision at this time. In addition, this court has no difficulty concluding that hardship to the plaintiffs would result if judicial consideration were withheld. This matter is ripe for decision by this court.

B. EXHAUSTION

When the actions of an administrative agency are involved, exhaustion of remedies is generally required to prevent premature interference with agency processes, so that the agency may function efficiently and correct its own mistakes, to afford the parties and the court the benefit of the agency's expertise, and to compile an adequate record for judicial review. *Weinberger v. Salfi*, 422 U.S. 749, 765, 95 S.Ct. 2457, 2466, 45 L.Ed.2d 522 (1975). However, when the issue is solely one of statutory interpretation, judicial review is permitted since resolution of the issue requires no special expertise on the part of the involved agency. *McKart v. United States*, 395 U.S. 185, 198-99, 89 S.Ct. 1657, 1665-66, 23 L.Ed. 2d 194 (1969).

Here, the issues before the court involve questions of law and statutory interpretation. There is no requirement that the plaintiffs exhaust their administrative remedies under these circumstances. Since the Commissioner has admitted that the plaintiffs meet the location requirements of 12 U.S.C. § 92 [Record #11, Tab 4], any further consideration by the Commissioner would involve the same evaluation of legal issues performed by this court. The plaintiffs' failure to exhaust their state administrative remedies does not prevent this court from exercising jurisdiction over this matter. *Shawnee Coal Co. v. Andrus*, 661 F.2d 1083, 1093 (6th Cir.1981).

C. ABSTENTION

The Commissioner and the associations point to two lines of abstention cases in support of their argument that this court should decline to exercise its jurisdiction in this matter. The court will address each line of cases separately.

1. *Younger* Abstention

Ordinarily, federal courts should not issue declarative or injunctive relief which would interfere with ongoing state proceedings. *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). However, the Commissioner and the associations are incorrect in arguing that *Younger* applies in the present case.

The ultimate question in this litigation is whether state law is preempted by federal law. In that circumstance, absention is not required. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 237, 104 S.Ct. 2321, 2327, 81 L.Ed.2d 186 (1984). This case neither requires the interpretation of state law nor the making of findings on disputed facts. The considerations which would require *Younger* abstention are not present. *Norfolk & Western Railway Co. v. Public Utilities Comm. of Ohio*, 926 F.2d 567, 573 (6th Cir.1991).

2. *Burford* Abstention

This court should also abstain from granting equitable relief that interferes with proceedings in state administrative agencies which involve complex state regulatory policies, such as ratemaking. *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed.2d 1424 (1943). However, like the *Younger* doctrine, *Burford* does not prevent this court from addressing issues of federal preemption of state law. *New Orleans Public Service, Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989). This case does not implicate *Burford* abstention.

D. THE MOTIONS TO DISMISS

The motions to dismiss of the Commissioner and the associations are without merit for the reasons stated above. Both motions will be denied.

III. LEGAL FRAMEWORK

Prior to evaluating the merits of the cross-motions for summary judgment, it is essential to set forth the legal framework for the discussion. Both federal and state law are involved, and the court will briefly discuss each.

A. FEDERAL LAW

The plaintiff banks are national banking associations organized under the laws of the United States. *See* 12 U.S.C. § 1 *et seq.* The National Banking Act constitutes the paramount authority for the operation of national banking associations, and, by itself, constitutes a complete system for the establishment and government of national banks. *First National Bank in Plant City, Fla. v. Dickinson,* 396 U.S. 122, 90 S.Ct. 337, 24 L.Ed.2d 312 (1969); *Deitrick v. Greaney,* 309 U.S. 190, 60 S.Ct. 480, 84 L.Ed. 694 (1940). However, national banks are also subject to state laws, so long as those state laws do not conflict with or frustrate the purpose of laws of the United States. *Starr v. O'Connor,* 118 F.2d 548 (6th Cir. 1941).

The National Banking Act was enacted in 1864. Act of June 3, 1864, c. 106, 13 Stat 99. In 1913, Congress enacted the Federal Reserve Act, Act of December 23, 1913, c. 6, 38 Stat. 251, to foster a flow of credit and money, through both federal and state chartered institutions, which would facilitate orderly economic growth. *Collateral Lenders Committee v. Board of Governors of the Federal Reserve System,* 281 F.Supp. 899, 904 (S.D. N.Y.1968).

In 1916, Congress amended the Federal Reserve Act, adding, among other sections, 12 U.S.C. § 92.[1] This section was added at the request of the Comptroller of the Currency, and allowed national banks located in towns with less than 5,000 inhabitants to sell insurance under certain circumstances.[2] The Comptroller has issued a regulation which provides that this section is applicable to any branch of a national bank which is located in a town with less than 5,000 inhabitants, even though the principal office of the national bank may be in a town with a population greater than 5,000 persons. 12 C.F.R. § 7.7100 (1971). Although there is a question as to whether 12 U.S.C. § 92 was repealed in 1918, the Comptroller has continued to assume that the section remains in

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[1] The question of whether this section continues to exist will be addressed later in this memorandum opinion and order.

[2] The full text of this section is as follows:

> In addition to the powers now [Sept. 7, 1916] vested by law in national banking associations organized under the laws of the United States any such association located in and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company; and may receive for services so rendered such fees between the said association and the insurance company for which it may act as agent; and may also act as the broker or agent for others in making or procuring loans on real estate located within one hundred miles of the place in which said bank may be located, receiving for such services a reasonable fee or commission: Provided, however, That no such bank shall in any case guarantee either the principal or interest of any such loans or assume or guarantee the payment of any premium on insurance policies issued through its agency by its principal: And provided further, That the bank shall not guarantee the truth of any statement made by an assured in filing his application for insurance. (Sept. 7, 1916, c. 461, 39 Stat. 753).

force. *See, e.g.*, Letter from First Deputy Comptroller for Policy Robert Bloom to Oklahoma Insurance Commissioner Gerald Grimes (November 14, 1975) [Record #11, Tab 8]; and Letter from Chief Counsel Paul Allen Schott to Louisiana Insurance Commissioner Douglas D. Green (October 30, 1990) [Record # 16, Tab 27].

Presently, approximately 179 national banks in fifteen states are conducting insurance activities pursuant to 12 U.S.C. § 92. Affidavit of Rosa M. Koppell, [Record #61, Exhibit 1.] None of these national banks are located in Kentucky. *Id.*

B. KENTUCKY LAW

Despite the enactment of 12 U.S.C. § 92, and quite apart from any debate over its continued existence, the Commissioner contends that national banks located in Kentucky may not engage in insurance activities, except in limited circumstances. The Commissioner presently finds support for this position in Ky.Rev.Stat. 287.030(4), which provides:

> No person who after July 13, 1984, owns or acquires more than one-half (½) of the capital stock of a bank shall act as insurance agent or broker with respect to any insurance except credit life insurance, credit health insurance, insurance of the interest of a real property mortgagee in mortgaged property, other than title insurance.

In an opinion addressing an earlier version of this statute, the Kentucky Attorney General concluded that a provision prohibiting one person from holding controlling interest in a bank was applicable to national banks doing business in Kentucky. Ky. OAG 70-643. Statutory language similar to the present language prohibiting insurance activities by persons owning more than one-half of the stock of a bank was added in 1972. 1972 Kentucky Acts. ch. 174. In 1981, the Kentucky Attorney General issued an opinion, based upon this statute, which con-

cluded that a bank holding company could not acquire 100% of the outstanding stock of an insurance agency. Ky. OAG 81-173. In 1984, the present language was enacted as a part of the Kentucky Bank Holding Company Act. 1984 Kentucky Acts ch. 130.

Since 1984, the Commissioner has taken the position that the present version of the statute, as set forth above, is applicable to national banks, and has used the 1970 Attorney General's Opinion as support for his position. *See* Letter from Assistant General Counsel Stephen B. Cox to David F. Presser (February 28, 1986) [Record #16, Tab 7].[3] The Commissioner has also taken the position that 12 U.S.C. § 92 only provides that the sale of insurance by a national bank is not *ultra vires* to the bank's charter, and does not convey a unilateral right to engage in the business of insurance.

Having provided the legal framework for the discussion, the court will now turn to the substantive claims of the parties. A very narrow question is presented: May the Commissioner, consistent with federal law, refuse to permit national banks to apply for insurance licenses?

IV. THE BANK HOLDING COMPANY ACT

The Commissioner and the associations maintain that the Bank Holding Company Act (BHCA), 12 U.S.C. § 1841 *et seq.*, allows states to regulate bank holding companies and their subsidiaries, including national banks, in the manner prescribed in Ky.Rev.St. 287.030(4). If true, this conclusion would obviate the need to address the questions presented under 12 U.S.C. § 92.[4]

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[3] The Commissioner likely took this position prior to 1984, as well, although no documents to that effect have been presented to the court.

[4] In addressing this argument, this court will assume, without deciding, the continued existence of 12 U.S.C. § 92. This is consistent with the position of the Commissioner and the associations that the court may decide the BHCA issue without reaching the question of the statute's continued existence.

The BHCA was enacted in 1956, to provide federal regulation of bank holding companies and the type of assets appropriate for such companies to control. S.Rep. No. 1095, 84th Cong., 1st Sess. 1 (1955). Unlike national banks, which are primarily regulated by the Comptroller of the Currency, primary regulatory authority for bank holding companies was placed with the Board of Governors of the Federal Reserve System (Federal Reserve Board). 12 U.S.C. § 1842. The BHCA is divided into two principal areas. Section 3, 12 U.S.C. § 1842, governs the authority of the Federal Reserve Board with respect to banking subsidiaries of bank holding companies. Section 4, 12 U.S.C. § 1843, governs the acquisition of non-banking subsidiaries.

The Commissioner and the associations argue that Section 7 of the BHCA, 12 U.S.C. § 1846 permits the application of Ky.Rev.St. 287.030(4) to the plaintiff banks.[5] Section 7 provides, "No provision of this chapter shall be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to companies, banks, bank holding companies, and subsidiaries thereof." 12 U.S.C. § 1846. The Commissioner and the associations both misread and misinterpret this section.

This section did not grant any additional regulatory powers to the states. It merely preserved the powers extant at the time of enactment and such powers as may exist in the future. It neither enlarged nor diminished state regulatory powers with respect to national banks or bank holding companies. *American Trust Co., Inc. v. South Carolina State Board of Bank Control,* 381 F.Supp. 313, 324 (D.S.C.1974). The legislative history of the BHCA

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[5] In addressing this argument, the court again notes that each of the plaintiff banks is a wholly owned subsidiary of a bank holding company. [Record #25, 26, 27]. It is not clear whether these holding companies are Kentucky corporations.

clearly reflects Congressional intent that it have a neutral effect on the dual system of banking regulation. This was the purpose for the inclusion of Section 7. *See Control and Regulation of Bank Holding Companies: Hearings on H.R. 2674 Before the House Comm. on Banking and Currency,* 84th Cong., 1st Sess. 366-67 (1955).

Since *M'Culloch v. Maryland,* 4 Wheat 316, 4 L.Ed. 579 (1819), it has been beyond doubt that Congress can establish and regulate a national system of banks. Only where Congress has explicitly provided for state regulation of national banks has such regulation been permitted. Otherwise, a state cannot prevent a national bank from exercising its express powers. *See Franklin Nat. Bank v. New York,* 347 U.S. 373, 378, 74 S.Ct. 550, 553, 98 L.Ed. 767 (1954).

Congress has typically permitted state regulation when it acts to preserve the dual system of banking in the United States, such as Congressional treatment of branch banking for national banks. *See* 12 U.S.C. § 36; *First Nat. Bank in Plant City Fl. v. Dickinson,* 396 U.S. 122, 90 S.Ct. 337, 24 L.Ed.2d 312 (1969). Congress could have permitted national banks to conduct branching activities regardless of state law. *Cf. Lyons Savings & Loan Ass'n v. Federal Home Loan Bank Board,* 377 F.Supp. 11, 20 (N.D.Ill.1974). However, it chose not to give national banks a competitive advantage over state banks.

In contrast, this case concerns an express power of certain national banks; a power granted by Congress, in the exercise of its unquestioned power to regulate the national banking system. The statute granting the power to sell insurance contains no language permitting states to absolutely prohibit of the exercise of this power by national banks. The only condition placed on the ability of these national banks to sell insurance is the requirement that the involved insurer be licensed to do business in the state by the appropriate state authorities. In short, 12

U.S.C. § 92 grants an express power to national banks which states could not eliminate when the BHCA was enacted, and cannot eliminate now.

Having determined that 12 U.S.C. § 1846 does not grant additional power to directly regulate national banks, the question then becomes whether states can regulate indirectly what they cannot regulate directly. This would be the end result if states were permitted to veto an express power of a national bank by virtue of their ability to regulate bank holding companies. This is an illogical result.

There is absolutely no doubt that Ky.Rev.St. 287.030 (4) is a permissible regulation of bank holding companies. However, there is also no doubt that a statute which expressly prohibited all banks operating in Kentucky from selling insurance would be an unconstitutional violation of the Supremacy Clause. U.S. Const., art. VI, cl. 2. Such a statute would directly conflict with federal law, and a national bank would not be suject to such regulation. *National State Bank, Elizabeth, N.J. v. Long,* 630 F.2d 981, 987 (3rd Cir.1980). The authority given to states to regulate bank holding companies does not give them any additional authority to regulate national banks simply because the national bank may happen to be a subsidiary of a bank holding company. Any authority a state has to regulate a national bank derives either from a specific grant of authority under federal law, or from the lack of an inconsistent federal law. It does not derive from the bank's form of ownership.

The Commissioner may regulate bank holding companies and their national bank subsidiaries. However, the BHCA does not permit the Commissioner to prohibit the exercise of an express power granted by Congress, without limitation, to national banks. Refusal to provide the

requested applications constitutes such an improper prohibition. This argument is without merit.[6]

V. THE EXISTENCE OF 12 U.S.C. § 92

Relatively late in the briefing of this case, an issue was presented to the court regarding the continued existence of 12 U.S.C. § 92. In *Independent Insurance Agents of America, Inc. v. Clarke*, 955 F.2d 731 (D.C.Cir.1992), the court concluded that Congress inadvertently repealed this section in 1918. One other court has addressed this issue, reaching the opposite result. *See American Land Title Ass'n v. Clarke*, 968 F.2d 150 (2nd Cir.1992). Not surprisingly, each side in the present case argues strenuously that the case which supports their position was correctly decided, while the other decision was poorly reasoned. This leaves the court with little choice but to examine the issue anew.

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[6] The authority cited by the Commissioner and the association in support of this argument is inapposite since the cases either deal with a state's ability to regulate bank holding companies or to exercise regulatory authority over national banks as permitted under federal law. This court takes issue with neither of those state powers. *See Commercial Nat. Bank of Little Rock v. Board of Governors of the Federal Reserve System*, 451 F.2d 86 (8th Cir.1971) (regulation of bank holding companies and branch banking); *Bank of New Orleans & Trust Co. v. Saxon*, 211 F.Supp. 576 (D.D.C.1962), *aff'd*, 323 F.2d 290 (D.C.Cir. 1963), *rev'd on jurisdictional grounds*, 379 U.S. 411, 85 S.Ct. 551, 13 L.Ed.2d 386 (1965) (regulation of bank holding companies); *Security Nat. Bank & Trust Co. v. First W.Va. Bancorp., Inc.*, 166 W.Va. 775, 277 (S.E.2d 613 (1981), *appeal dismissed*, 454 U.S. 1131, 102 S.Ct. 986, 71 L.Ed.2d 284 (1982) (regulation of bank holding companies); *Whitney Nat. Bank in Jefferson Parish v. James*, 189 So.2d 430 (La.App.), *appeal denied*, 249 La. 759, 191 So.2d 140 (1966) (regulation of bank holding companies and branch banking); *Braeburn Securities Corp. v. Smith*, 15 Ill.2d 55, 153 N.E.2d 806 (1958), *appeal dismissed*, 359 U.S. 311, 79 S.Ct. 876, 3 L.Ed.2d 831 (1959) (regulation of bank holding companies).

For the sake of brevity, the court will not engage in a lengthy explication of the relevant legislative history. Rather, the court will simply state that it has examined the materials provided by the parties in support of their respective positions. Having reviewed the legislative history and studied the reasoned opinions of both the District of Columbia Circuit Court of Appeals and the Second Circuit Court of Appeals, the court agrees with the rationale of the Second Circuit. Accordingly, that part of the Second Circuit Opinion headed "A. Validity of 12 U.S.C. § 92" is adopted by this court the same as if set forth herein. *Id.*, at 151-54.

This court's examination of the legislative history of § 92 would have led it to the same conclusion quite apart from the Second Circuit's decision. To determine that § 92 has been repealed would be to circumvent logical statutory construction. This court also holds that "section 92 remains valid law." *Id.*, at 154.

VI. PREEMPTION

Having determined that 12 U.S.C. § 92 continues to exist with the full force of law, the court now turns to the question of whether this section preempts Ky.Rev.St. 287.030(4). At the outset, the court again notes that § 92 grants to national banks located in towns with less than 5,000 persons the express power to act as insurance agents. National banks are not subject to attempted state control which would directly conflict with laws of the United States. *Starr v. O'Connor*, 118 F.2d at 555.[7]

In addressing the question of preemption, the Commissioner and the associations are correct that the standard for preemption does not change simply because national banks are involved. Under the Supremacy Clause

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[7] The court takes no position on whether the express language of Ky.Rev.Stat. 287.030(4) permits its application directly to national banks. It is sufficient for the purpose of this inquiry that the Commissioner has applied it in such a manner.

of the Constitution, Art. VI, cl. 2, any state law which conflicts with federal law is "without effect." *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S.Ct. 2114, 2129, 68 L.Ed.2d 576 (1981). However, "consideration of issues arising under the Supremacy Clause 'start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.' " *Cipollone v. Liggett Group, Inc.*, —— U.S. ——, ——, 112 S.Ct. 2608, 2617, 120 L.Ed.2d 407 (1992), *quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947). Accordingly, the Congressional purpose for the enactment is the ultimate determining factor in the preemption analysis. *Malone v. White Motor Corp.*, 435 U.S. 497, 504, 98 S.Ct. 1185, 1190, 55 L.Ed.2d 443 (1978).

As articulated in *Cipollone*, there are three principal ways for Congress to signal the paramount authority of federal law in a particular area. *Cipollone*, —— U.S., at ——, 112 S.Ct., at 2615-19. First, Congressional intent of supremacy may be expressly stated in the language of the statute or implicitly contained in its structure and purpose. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977). Second, in the absence of express Congressional guidance, state law will be preempted if it actually conflicts with federal law. *Pacific Gas & Elec. Co. v. Energy Resources Conservation and Development Comm'n*, 461 U.S. 190, 204, 103 S.Ct. 1713, 1722, 75 L.Ed.2d 752 (1983). Finally, contrary state laws may be preempted if federal law has so thoroughly occupied a field as to allow a reasonable inference that Congress intended no state law to supplant federal authority. *Fidelity Federal Savings & Loan Ass'n. v. De la Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982).

The Commissioner and the associations are correct that there is no express statement of supremacy in § 92, nor

has Congress occupied the entire field of national bank regulation. However, § 92 does appear to squarely conflict with Ky.Rev.St. 287.030(4), as it has been interpreted by the Commissioner.

The Commissioner and the associations contend that there is no actual conflict between § 92 and the state statute and raise three arguments in support of that position. For an actual conflict to exist, it must be a physical impossibility to comply with both the federal and state statutes. *Hillsborough County, Fla. v. Automated Medical Labs, Inc.*, 471 U.S. 707, 713, 105 S.Ct. 2371, 2375, 85 L.Ed.2d 714 (1985).

First, the Commissioner and the associations maintain that the two statutes can be easily reconciled. This argument attempts to weaken the express language of § 92, by massaging the Commissioner's 1986 position that § 92 merely provides that this insurance activity is not *ultra vires* to a national bank's charter. *See* Letter from Assistant General Counsel Stephen B. Cox to David F. Presser (February 28, 1986) [Record #16, Tab 7]. Section 92 itself disposes of this argument. If a national bank meeting the requirements of § 92 wishes to exercise the power granted to it under this statute, it cannot do so under the present interpretation of Kentucky law by the Kentucky Insurance Commissioner.

Indeed, the scant legislative history of § 92 itself reveals that the primary intent of § 92 was not to place national banks on the same footing as state banks in states where state banks were permitted to sell insurance. Rather, the primary intent was to strengthen small national banks by providing them with an additional source of revenue. *See* Letter from Comptroller John Skelton Williams to Senator Robert Owen (June 8, 1916) [included at 53 Cong. Rec. 11001]. There is no indication that Congress intended that § 92 would only apply where it was needed to allow national banks to compete with state banks. There is absolutely no authority for the Com-

missioner's pseudo *ultra vires* argument. It is indeed impossible to reconcile these two provisions.

Second, the Commissioner and the associations contend that Ky.Rev.St. 287.030(4) does not purport to regulate national banks. Instead, they contend that the statute only regulates the licensure of insurance agents within the Commonwealth, based upon their affiliation with bank holding companies. This argument is disingenuous at best, and erroneous at worst. The section is included within a statute addressed to limitations on the powers of banks, and is contained in the chapter of the Kentucky Revised Statutes dedicated to banks and trust companies. It is an attempt to regulate bank holding companies, and, by interpretation, their national bank subsidiaries. It is at best, an indirect regulation of insurance licenses. As interpreted by the Commissioner, it is in direct conflict with a federal statute and is preempted.

Finally, the Commissioner and the associations argue that Ky.Rev.Stat. 287.030(4) is consistent with the objectives of Congress in enacting § 92. This relies upon a statement in Comptroller Williams' letter which refers to allowing national banks to become more competitive with state banks which are authorized to engage in nonbanking activities. However, this court's reading of the Williams letter indicates that the primary objective was to ensure profitability for smaller national banks which would allow them to both lend money at nonusurious rates and make a better return to their stockholders. Comptroller Williams did not specifically reference the ability of state banks to engage in the business of insurance, but merely pointed out that some state banks were able to carry on nonbanking activities. Recognizing that fact, he could have recommended that language be included which limited the exercise of this power to states where both national and state banks could engage in insurance activities. However, no such limitation was included. Reflecting the desire to provide an additional

revenue source to national banks, § 92 was drafted to apply to all national banks meeting its requirements. Ky. Rev. Stat. 287.030(4) is not consistent with Congressional objectives in enacting § 92.

The court has no difficulty concluding that § 92 preempts Ky.Rev.Stat. 287.030(4). To the extent that the Commissioner interprets the Kentucky statute to prohibit national banks in Kentucky from utilizing § 92, that interpretation is in direct conflict with federal law. The Commissioner is attempting to prevent national banks from participating in the sale of insurance simply because they are banks. This is contrary to the Congressional enactment. Congress clearly knew how to defer to state regulatory authority over national banks. It did so in permitting states to determine whether national banks within their borders could engage in branch banking. 12 U.S.C. § 36. There is no such deference contained in § 92. The state statute, as interpreted, must give way in the face of contrary federal law. *Davis v. Elmira Savings Bank,* 161 U.S. 275, 16 S.Ct. 502, 40 L.Ed. 700 (1896). The plaintiff banks may not be prevented from applying for insurance licenses.

VII. THE McCARRAN-FERGUSON ACT

Finally, the Commissioner and the associations argue that Ky.Rev.Stat. 287.030(4) is a valid exercise of state authority under the McCarran-Ferguson Act. 15 U.S.C. §§ 1011-1015. This act was passed in response to the Supreme Court's decision in *United States v. South-Eastern Underwriters Ass'n,* 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944), which held that insurance companies were subject both to regulation by Congress and to federal anti-trust laws.

At issue in this case is 15 U.S.C. § 1012(b) which provides:

> (b) Federal regulation. No Act of Congress shall be construed to invalidate, impair, or supersede any

> law enacted by any State for the Purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance.

It is perhaps simpler to address this statute in reverse order and first examine whether 12 U.S.C. § 92 is an Act of Congress which relates to the business of insurance.

The "business of insurance" has been narrowly defined, and it seems fairly obvious that § 92 does not constitute Congressional regulation of that business. This section is a part of the National Bank Act, and its function is to grant additional powers to national banks. That the power granted to the national banks involves insurance does not transform this section into a regulation of the business of insurance. Accordingly, § 92 will not invalidate the Kentucky statute on these grounds.

Moreover, the other portion of 15 U.S.C. 1012(b) is equally inapplicable to this case. Just as § 92 does not regulate the business of insurance, neither does Ky. Rev.Stat. 287.030(4) constitute insurance regulation. As previously mentioned, this statute regulates bank holding companies, and is contained in chapter of the Kentucky Revised Statutes regulating banks and trust companies. It does not appear in the portion of the Kentucky Revised Statutes which regulates insurance. It relates to the powers of bank holding companies, not to the powers of insurance companies or agents.

To determine whether a state law or regulation governs the "business of insurance", the Supreme Court has articulated a three-part test. The court must consider:

> [F]irst, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry.

Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 129, 102 S.Ct. 3002, 3009, 73 L.Ed.2d 647 (1982). Applying these criteria to the present case, the court reaches the inescapable conclusion that Ky.Rev.St. 287.030(4) does not regulate the business of insurance. The Kentucky statute is not concerned with transferring or spreading the risk of any policyholders, nor does bank holding company ownership of insurance entities constitute an integral part of the policy relationship between the insurer and the insured. Finally, bank holding companies are not entities within the insurance industry. The McCarran-Ferguson Act has no applicability to the issue now before the court. *See United Services Auto Ass'n v. Muir,* 792 F.2d 356 (3rd Cir.1986), *cert. denied,* 479 U.S. 1031, 107 S.Ct. 875, 93 L.Ed.2d 830 (1987).

VIII. CONCLUSION

Based upon the foregoing analysis, the court believes that the Commissioner is required to provide the plaintiff banks, and other similarly situated national banks, with applications for insurance licenses. The Commissioner's interpretation of law reflected in this litigation is incorrect.[8]

This memorandum opinion and order contains the court's rulings on all pending motions except the motions for summary judgment which will be addressed by separate order. The court having considered the record and being otherwise sufficiently advised,

Accordingly,

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[8] The court specifically declines to determine whether the Commissioner is required to issue licenses once the completed applications are received. Whether national banks are subject to Kentucky's criteria for the issuance of an insurance license is not properly before the court, and may well implicate McCarran-Ferguson in other respects. In any event, the court need not reach this issue in narrowly deciding that Ky.Rev.Stat. 287.030(4), as interpreted, is preempted by 12 U.S.C. § 92, and does not permit the Commissioner to refuse to provide the requested applications.

IT IS HEREBY ORDERED:

(1) that the Commissioner's motion to dismiss, [Record #4], be, and is DENIED, in conformity with the reasons stated herein;

(2) that the associations' motion to dismiss, [Record #7], be, and is DENIED, in conformity with the reasons stated herein; and

(3) that the plaintiffs' motion for leave to file a memorandum of supplemental authorities, [Record #43], be, and is GRANTED.

SUMMARY JUDGMENT

In accordance with the memorandum opinion and order entered contemporaneously with this summary judgment,

IT IS HEREBY ORDERED:

(1) that the motion of the plaintiffs for summary judgment, [Record #14], be, and is GRANTED, and summary judgment is ENTERED on behalf of the plaintiffs on their complaint;

(2) that the joint motion of the defendant and the intervening defendants for summary judgment, [Record #28], be, and is DENIED;

(3) that the motion of the intervening plaintiff for summary judgment, [Record #60], be, and is GRANTED, and summary judgment is ENTERED on behalf of the intervening plaintiff on its intervening complaint;

(4) that, notwithstanding the provisions of Ky.Rev. Stat. 287.030(4), any national bank in Kentucky that is located and doing business in a town with a population that does not exceed 5,000 inhabitants, according to the last decennial census, has the right and authority, by virtue of 12 U.S.C. § 92, and Article VI, Cl. 2 of the

United States Constitution, to engage in the business of insurance, in accordance with applicable law;

(5) that the defendant, Ronnie C. Moore, in his official capacity as Commissioner of the Kentucky Department of Insurance, and his successors, agents, employees, representatives or others acting in concert with him, be, and are permanently enjoined from refusing to provide an application to become an insurance agent to any national bank located and doing business in a town in Kentucky with a population that does not exceed 5,000 inhabitants, according to the last decennial census; and,

(6) that this matter be, and is STRICKEN from the docket of this court.

APPENDIX C

[Filed Mar. 15, 1995]

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 92-6330/6331

THE OWENSBORO NATIONAL BANK, *et al.*,
Plaintiffs-Appellees,

UNITED STATES OF AMERICA,
Intervenor-Appellee,

v.

KENTUCKY STATE ASSOCIATION OF LIFE UNDERWRITERS, *et al.*,
Intervenors,

DON W. STEPHENS, COMMISSIONER. DEPARTMENT OF INSURANCE, COMMONWEALTH OF KENTUCKY

ORDER

Before: GUY and BATCHELDER, Circuit Judges; and McKEAGUE,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges

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* Hon. David W. McKeague, United States District Judge for the Western District of Michigan, sitting by designation

having favored the suggestion, the petition for rehearing has been referred to the origial hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

APPENDIX D

12 U.S.C. § 92
UNITED STATES CODE ANNOTATED
TITLE 12. BANKS AND BANKING
CHAPTER 2—NATIONAL BANKS

SUBCHAPTER IV—REGULATION OF THE BANKING BUSINESS; POWERS AND DUTIES OF NATIONAL BANKS

§ 92. Acting as insurance agent or broker

In addition to the powers now vested by law in national banking associations organized under the laws of the United States any such association located and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company; and may receive for services so rendered such fees or commissions as may be agreed upon between the said association and the insurance company for which it may act as agent: Provided, however, That no such bank shall in any case assume or guarantee the payment of any premiums on insurance policies issued through its agency by its principal. And provided further, That the bank shall not guarantee the truth of any statement made by an assured in filing his application for insurance.

APPENDIX E

THE McCARRON-FERGUSON ACT, SECTION 2
UNITED STATES CODE ANNOTATED
TITLE 15. COMMERCE AND TRADE
CHAPTER 20—REGULATION OF INSURANCE

§ 1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948

(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 14, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

APPENDIX F

KRS § 287.010
BALDWIN'S KENTUCKY REVISED STATUTES
ANNOTATED
TITLE XXV
BUSINESS AND FINANCIAL INSTITUTIONS
CHAPTER 287 BANKS AND TRUST COMPANIES

287.010 DEFINITIONS

As used in this chapter, unless the context requires otherwise:

(1) "Bank" means any bank which is now or may hereafter be organized under the laws of this state or a combined bank and trust company;

(2) "National bank" or "national bank association" means a bank created by Congress and organized pursuant to the provisions of federal law;

(3) "Commissioner" means the commissioner of financial institutions;

(4) "Department" means the department of financial institutions;

(5) "Population" means the population as indicated by the latest regular United States census; and

(6) "Trust company" includes every corporation authorized by this chapter to do a trust business;

(7) "Undivided profits" means the composite of the bank's net retained earnings from current and prior years' operations;

(8) "Capital stock" shall mean, at any particular time, the sum of:

(a) The par value of all shares of the corporation having a par value that have been issued;

(b) The amount of the consideration received by the corporation for all shares of the corporation that have been issued without par value except such part of the consideration as has been allocated to surplus in a manner permitted by law; and

(c) Such amounts not included in paragraphs (a) and (b) of this subsection as have been transferred to stated capital of the corporation, whether through the issuance of stock dividends, resolution of the bank's board of directors under applicable corporate law or otherwise by law; and

(9) "Surplus" means the amount of consideration received by the corporation for all shares issued without par value that has not been allocated to capital stock or the amount of consideration received by the corporation in excess of par value for all shares with a par value or both.

APPENDIX G

KRS § 287.030
BALDWIN'S KENTUCKY REVISED STATUTES
ANNOTATED
TITLE XXV
BUSINESS AND FINANCIAL INSTITUTIONS
CHAPTER 287 BANKS AND TRUST COMPANIES

287.030 LIMITATION ON RIGHT TO ENGAGE IN BUSINESS

(1) As used in this section, "person" includes a natural person, partnership, corporation, association, business trust, voting trust, or similar organization.

(2) No persons, except corporations, shall engage in the business of private banking in this state.

(3) No bank incorporated under the laws of another state or national bank having its principal place of business outside this state shall transact any banking business in this state except to lend money.

(4) No person who after July 13, 1984, owns or acquires more than one-half (½) of the capital stock of a bank shall act as insurance agent or broker with respect to any insurance except credit life insurance, credit health insurance, insurance of the interest of a real property mortgagee in mortgaged property, other than title insurance.

(5) No bank incorporated under the laws of the Commonwealth of Kentucky shall make any loan or discount on the security of the shares of its own capital stock, or the shares of stock of a bank holding company which controls the bank to the extent that such loan or discount secured by such shares exceeds the amounts permitted by section 23(A) of the Federal Reserve Act (12 U.S.C. Sec. 371c) as that section reads on July 15, 1986, nor be the purchaser or holder of any such shares, except that a

bank may take property of any kind to satisfy or protect a loan previously made in good faith and in the ordinary course of business; and stock so purchased or acquired, shall, within six (6) months from the time of its purchase or acquisition, be sold or disposed of at public or private sales. This subsection shall not affect or modify in any way KRS 386.025, but said section shall remain in full force and effect.

APPENDIX H

IN HOUSE
SPECIAL SESSION 1991

KY. HOUSE RESOLUTION NO. 63

THURSDAY, JANUARY 31, 1991

Representatives H. Ramsey Morris, Jr., James E. Bruce, and Ray H. Altman introduced the following resolution which was ordered to be printed.

A RESOLUTION requesting the banking industry to refrain from seeking to be licensed to sell insurance other than that allowed under KRS 287.030.

WHEREAS, 12 U.S.C. 92, enacted in 1916, provides that national banks in towns with population of 5,000 or less may act as agents for any line of insurance; and

WHEREAS, the Kentucky Department of Insurance has consistently held that 12 U.S.C. 92 does not preempt state law because 15 U.S.C. 1012 provides that Congress cannot enact a law that supersedes any state law regulating the business of insurance; and

WHEREAS, the Kentucky General Assembly has appropriately addressed this issue with enactment of KRS 287.030 which permits a bank to be licensed to sell only credit life insurance, credit health insurance or real property mortgage protection insurance; and

WHEREAS, if banks were licensed to sell homeowners, automobile, and other lines of insurance, the con-

sumer could feel coerced into purchasing insurance from the bank to obtain the loan regardless of the insurance premium;

NOW, THEREFORE,

Be it resolved by the House of Representatives of the General Assembly of the Commonwealth of Kentucky:

Section 1. That the banking industry of the Commonwealth of Kentucky refrain from seeking to be licensed to sell insurance other than that allowed by the General assembly under KRS 287.030.

Section 2. That a copy of this resolution be sent to the Kentucky Bankers Association, One Riverfront Plaza, Suite 500, Louisville, Kentucky, 40202 and to the Independent Community Bankers Association of Kentucky, 420 Capitol Avenue, Frankfort, Kentucky 40602.

APPENDIX I

ATTORNEY GENERAL

OAG 70-643

BANKS AND TRUST COMPANIES—Branch banks, establishment of, requirements, procedure; capital stock, ownership restrictions; definitions

SYLLABUS: KRS 287.030, relating to restrictions on bank stock ownership, applies to national banks doing business in Kentucky as well as to state banks.

To: Joseph J. Kaplan, Atty. at Law, Mation E. Taylor Bldg., Louisville, Ky.

By: John B. Breckinridge, Attorney General, September 21, 1970

This is responsive to your letter concerning whether or not KRS 287.030(3) is applicable to national banks doing business in Kentucky. That subsection reads:

> "No person shall, directly or indirectly, hold or own more than one-half of the capital stock of a bank or trust company, exclusive of stock held as collateral; but there is no limitation on the amount of capital stock that may be held by the United States or by a corporation in which the United States owns or holds a majority of the stock."

In our letter to you of November 7, 1968, we concluded that the statute did apply to national banks. In OAG 70-36, copy enclosed, we concluded that the statute did *not* apply to national banks domiciled in Kentucky. These divergent views have necessitated our review of the problem.

Historically, opposition to the exercise of federal power in the banking field was registered by President Jefferson, who opposed the creation of the First Bank of the

United States, and by President Jackson, who vetoed an act of Congress extending the charter of the Second Bank of the United States. However, the paramount power of the Congress over national banks has been settled for over a century and a half. In M'Culloch v. Maryland (1819, U.S.) 4 Wheat 316, 4 L.ed. 579, the Supreme Court held that a national bank could be chartered under the implied powers of Congress as an instrumentality of the federal government to implement its fiscal powers. See also First Nat. Bank v. Walker Bank & Trust Co., 385 U.S. 252, 17 L.ed. (2d) 343, 87 S Ct 492.

In the early case of the First National Bank of Louisville v. Commonwealth of Kentucky (1870, U.S.) 9 Wall 353, 19 L.ed. 701, the Court pointed out that national banks or other instrumentalities of the federal government are not to be wholly withdrawn from the operation of state legislation; that agencies of the federal government are only exempted from state legislation insofar as that legislation may interfere with or impair their efficiency in performing the functions by which they are designed to serve that government. The Court also said at p. 703:

> "They [national banks] are subject to the laws of the state, and are governed in their daily course of business far more by the laws of the state than of the nation. All their contracts are governed and construed by state laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be used for debts, are all based on state law. It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional."

In McClellan v. Chipman, 164 U.S. 347, 41 L.ed. 461, 17 S Ct 85 (1896), the Court explained that national banks are subject to state legislation, except where such legislation is in conflict with some act of Congress, or

where it tends to impair or destroy the utility of such banks as agents or instrumentalities, or interferes with the purpose of their creation. See also Anderson Nat. Bank v. Luckett, 321 U.S. 233, 88 L.ed. 692, 64 S Ct 599 (1943); the Annotation, "validity of state statute regulating activities of national banks—federal cases," at 98 L.ed. 775; and Anderson Nat. Bank v. Reeves, 293 Ky. 735, 170 S.W.(2d) 350 (1943) at 355.

We are not aware of any provision of Title 12 of the United States Code which would create any conflict with the regulatory effect of KRS 287.030(3) as applied to national banks domiciled in Kentucky.

The final question is whether or not the statute applies to national banks. We believe that it does. KRS 287.010(1)(a) provides that "As used in this chapter, unless the context requires otherwise, 'Bank' includes every corporation (*authorized by this chapter to do a banking business*;" (emphasis added). It is significant to note that there are statutory sections in Chapter 287 which employ the expression "any bank organized under the laws of this state" [e.g., KRS 287.190]. See also KRS 287.171(2) which defines a "state bank" as a bank or trust company organized under the provisions of KRS Chapter 287. Other statutes simply refer to "any bank or trust company," or "any national bank." KRS 287.180 (5) reads:

> "Any national banking association or any state bank member of the Federal Reserve System whose principal office is located in this state is hereby authorized to do all things and perform all acts which state banks are permitted to do or perform under this section, subject to the conditions and restrictions provided for banks as to exercise of such powers."

There are various statutes which deal explicitly with national banks. We are therefore constrained to conclude, under the foregoing authorities and analysis, that

national banks fall within the operative effect of KRS 287.030(3). We have already stated that we can find no conflict with federal law. This restriction in stock ownership in no way impinges upon the federal sovereignty; and the state law is in the public interest as a means of preventing the concentration of financial power in one person or company. OAG 70-36, to the extent that it is in conflict with this opinion, is hereby withdrawn.

APPENDIX J

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 93-3508

BARNETT BANK OF MARION COUNTY, N.A.,
a national banking association,
Plaintiff-Counter-Defendant,
Appellant, Cross-Appellee,

v.

TOM GALLAGHER, Insurance Commission of the State of Florida, Fla. Dept. Insurance, a state agency,
Defendants-Appellees,
Cross-Appellant,

FLORIDA ASSOCIATION OF LIFE UNDERWRITERS, PROFESSIONAL INSURANCE AGENTS OF FLORIDA, INC., FLORIDA ASSOCIATIONS OF INSURANCE AGENTS,
Defendants-Counter-Claimant,
Appellees-Cross-Appellants.

Appeals from the United States District Court
for the Middle District of Florida

Jan. 30, 1995

Before COX, Circuit Judge, FAY, Senior Circuit Judge, and CARNES *, District Judge.

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* Honorable Julie E. Carnes, U.S. District Judge for the Northern District of Georgia, sitting by designation.

FAY, Senior Circuit Judge:

This appeal arises from a final order following a bench trial on the merits of plaintiff Barnett Bank of Marion County's ("Barnett Marion") suit for permanent injunctive and declaratory relief against Florida Insurance Commissioner Tom Gallagher and the Florida Department of Insurance. The Florida Association of Life Underwriters, Professional Insurance Agents of Florida, Inc., and the Florida Associations of Insurance Agents intervened in the district court. Appellant Barnett Marion alleges the district court erred in concluding that Fla. Stat. ch. 626.988 regulates insurance, and in concluding that 12 U.S.C. § 92 ("section 92") does not relate to insurance.[1] We disagree, and AFFIRM the district court judgment.

Appellee/Cross-Appellants Tom Gallagher and the Florida Department of Insurance allege the district court erred in holding section 92 permits national banks to sell insurance nationwide. Appellee/Cross-Appellants Florida Association of Life Underwriters, Professional Insurance Agents of Florida, Inc., and the Florida Associations of Insurance Agents allege the district court erred in finding that Appellant Barnett Marion was "located and doing business in a place with a population of less than 5000" pursuant to section 92. Based on our reading of the Federal and Florida statutes, we find it unnecessary to reach either of these issues.

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[1] Recently the United States Supreme Court resolved a conflict among the Circuit Courts of Appeals by holding that section 92 properly is included in § 13 of the Federal Reserve Act (Act Dec. 23, 1913, ch. 6) rather than the National Bank Act. *See United States Nat'l Bank of Or. v. Indep. Ins. Agents*, —— U.S. ——, ——-——, 113 S.Ct. 2173, 2182-86, 124 L.Ed.2d 402 (1993). Both the parties and the district court at various times refer to the section as part of the National Bank Act. While this nomenclature does not affect the section's validity in light of the Supreme Court case, for clarity's sake this Court will refer to the statute simply as "section 92."

I. BACKGROUND

Florida law precludes bank subsidiaries or bank holding company affiliates from conducting insurance activities in Florida. Fla. Stat. ch. 626.988 (1993). Federal law, however, allows national banks—despite their status as subsidiaries or affiliates—to act as insurance agents in localities with fewer than five thousand people. 12 U.S.C. § 92 (1988).

Barnett Marion is a national-bank subsidiary of a bank holding company, Barnett Banks, Inc. Barnett Marion's principal place of business is Ocala, Florida, but it maintains a branch office in Belleview, Florida. Belleview's population is fewer than five thousand, as shown by the last decennial census. Barnett purchased an insurance agency from Linda K. Clifford in Belleview. As a result, Ms. Clifford, a Florida licensed insurance agent, became an employee of Barnett Marion and maintained her office inside the bank.

The day of the purchase, Barnett Marion sought a declaration allowing it to use this branch office to "market insurance to existing and potential customers regardless of where the insurance customers are located." Barnett Marion argued that 12 U.S.C. § 92 preempted Fla.Stat. ch. 626.988, and asked the district court to find that:

> Barnett Bank, and, specifically Barnett Bank Belleview, is authorized and empowered by federal law to act as an agent for any insurance company authorized by the State of Florida to do business in Florida.

(R1-1-7).

Four days later, the Florida Department of Insurance ("Department") issued an Immediate Final Order ("IFO") directing Linda Clifford and her associate agents to cease insurance agency activities other than selling credit life and credit disability insurance. Barnett Marion

moved for a temporary restraining order ("TRO") and sought to enjoin the Department from acting on the IFO.

The district court denied Barnett Marion's motion for TRO and held a hearing on the motion for preliminary injunction. The court denied the motion for the preliminary injunction and set the case for trial.

The issues before this court are as follow: First, whether Fla.Stat. ch. 626.988 regulates insurance. Second, whether 12 U.S.C. § 92 relates to insurance. Third, whether Barnett Marion is located and doing business in a place with fewer than five thousand people, and if so, whether the bank may sell insurance nationally or only within this small town. To answer these questions of law we must examine the history and purposes of these statutes.

II. JURISDICTION

Upon the Court's request at oral argument, each side briefed the issue of whether the district court had subject matter jurisdiction to decide the case. Based on *Lawrence County v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256, 259 n. 6, 105 S.Ct. 695, 697 n. 6, 83 L.Ed.2d 635 (1985) and *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 96 n. 14, 103 S.Ct. 2890, 2899 n. 14, 77 L.Ed.2d 490 (1983), we find subject matter jurisdiction. The United States Supreme Court specified in *Shaw* that:

> The Court's decision today in *Franchise Tax Board v. Construction Laborers Vacation Trust, ante,* [463 U.S.] p. 1, [103 S.Ct. 2841, 77 L.Ed.2d 420] (1983) does not call into question the lower courts' jurisdiction to decide these cases. *Franchise Tax Board* was an action seeking a declaration that state laws were *not* pre-empted by ERISA. Here, in contrast, companies subject to ERISA regulation seek injunctions against enforcement of state laws they claim *are* pre-empted by ERISA, as well as declarations that those laws are pre-empted.

> It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights. See *Ex parte Young*, 209 U.S. 123, 160-162 [28 S.Ct. 441, 454-55, 52 L.Ed. 714] (1908). A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 131 to resolve.

Id. at 96, n. 14, 103 S.Ct. at 2899, n. 14.

In accord with Supreme Court case law, we hold that a federal court has federal question jurisdiction to decide a claim against a state officer or agency alleging that a federal statute preempts a state statute under the Supremacy Clause and that the state statute cannot be enforced. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

III. STANDARD OF REVIEW

This appeal requires review of the district court's statutory interpretation. Such review is *de novo. Centel Cable Televison Co. of Fla. v. Thomas J. White Dev. Corp.*, 902 F.2d 905, 908 (11th Cir.1990); *Keys Jet Ski, Inc. v. Kays*, 893 F.2d 1225, 1227 (11th Cir.1990). We review the district court's fact findings in a bench trial for clear error. Fed.R.Civ.P. 52(a); *Anderson v. Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985).

IV. ANALYSIS

A. Findings of Fact

While the parties dispute whether the trial court made findings of fact or merely conclusions of law, none of the parties alleges the trial court erred in its fact-finding. Appellant Barnett Marion's Initial Brief at 16; Appellee

Gallagher's Initial Brief at 13; Appellee Underwriter's Initial Brief at 12. Accordingly, we review *de novo* the trial court's conclusions of law.

B. Conclusions of Law

1. McCarran-Ferguson

In the late 19th Century, the United States Supreme Court held insurance contracts were not in interstate commerce. *Paul v. Virginia*, 75 U.S. (8 Wall) 168, 183, 19 L.Ed. 357 (1868). The states then developed extensive insurance regulations. In 1944, the Supreme Court rejected that analysis in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944), holding Congress could regulate insurance under its Commerce Clause power. *Id.* at 553, 64 S.Ct. at 1173-74.

In response, Congress passed the McCarran-Ferguson Act, which proclaimed that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, *unless such Act specifically relates to the business of insurance.*" 59 Stat. 34 (1945), 15 U.S.C. § 1012(b) (emphasis added). This statutory scheme creates a reverse-preemption doctrine for insurance legislation. That is, a state statute that regulates insurance presumptively preempts a contrary Congressional statute unless the Congressional statute specifically relates to insurance. Congress declared this state regulation to be in "the public interest." 15 U.S.C. § 1011.

With McCarran-Ferguson guiding our analysis, this Court first must ask whether Fla.Stat. ch. 626.988 *regulates* insurance, so as to presumptively preempt contrary federal law. Second, we must ask whether section 92 *specifically relates* to insurance, so that it will fit within

the McCarran-Ferguson exception that reinstates federal law as supreme.

2. Florida law

The state statute at issue, Fla.Stat. ch. 626.988, is part of the Unfair Insurance Trade Practices Act (Part X), located within the Florida Insurance Code. Florida Statute chapter 626.951 declares that:

> The purpose of this part [X] is to regulate trade practices relating to the business of insurance in accordance with the intent of Congress as expressed in the Act of Congress of March 9, 1945 (Pub.L. No. 15, 79th Congress) [McCarran-Ferguson], by defining, or providing for the determination of all such practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined.

To this end, Fla.Stat. ch. 626.988 provides, in relevant part:

> (2) No insurance agent or solicitor licensed by the Department of Insurance under the provisions of this chapter who is associated with, under contract with, retained by, owned or controlled by, to any degree, directly or indirecty, or employed by, a financial institution shall engage in insurance agency activities as an employee, officer, director, agent, or associate of a financial institution agency.

Fla.Stat. ch. 626.988(2). Subsection (1)(a) defines a "financial institution" to include any bank or bank holding company, or any subsidiary, affiliate, or foundation thereof. "Specifically excluded from this definition is any bank which is not a subsidiary or affiliate of a bank holding company and is located in a city having a population of less than 5,000 according to the last preceding census."

Id. Barnett Marion's status as a national-bank subsidiary removes it from this narrow exception and prohibits it from engaging in insurance activities under the Florida statute.

At first blush, it seems evident that a statutory chapter entitled "Insurance Field Representatives and Operations," Fla.Stat. ch. 626, and a statutory part entitled "Unfair Insurance Trade Practices," Fla.Stat. ch. 626, part X, must regulate insurance. The Supreme Court, however, has cautioned that location informs but does not determine whether a statute regulates "the business of insurance." *United States Dept. of Treasury v. Fabe,* —— U.S. ——, ——, 113 S.Ct. 2202, 2210, 124 L.Ed.2d 449 (1993). More important, held the Court, is whether the statute's aim is to regulate "an essential part of the 'business of insurance.'" *Id.*

In *Fabe,* the Supreme Court held that an Ohio statute that accorded policyholders priority over an insolvent insurance company's other creditors *was* a law enacted to regulate the business of insurance because it regulated policyholders and their relationship to the insurance company. *Id.* at ——, 113 S.Ct. at 2212. Under McCarran-Ferguson, this portion of the Ohio statute preempted a contrary federal statute giving the United States priority over other creditors of a bankrupt. *See id.* The Supreme Court in *Fabe* took this "relationship" test directly from *S.E.C. v. Nat'l Sec., Inc.,* 393 U.S. 453, 89 S.Ct. 564, 21 L.Ed2d 668 (1969), which involved an Arizona statute designed to protect insurance companie's *share*holders. In finding that the Arizona statute was not enacted to regulate the *business* of insurance, the Court held:

> The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the "business of insurance" [as used within McCarran-Ferguson]. Undoubtedly, other activities of

> insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was—it was on the *relationship between the insurance company and the policyholder.* Statutes aimed at protecting or regulating this relationship, *directly or indirectly,* are laws regulating the "business of insurance."

Id. at 460, 89 S.Ct at 568-69 (emphasis added).

The question we now ask is whether the Florida statute meets this test because it was enacted to protect policyholders by regulating their relationship with the insurer. In the instant case, the trial court relied on state court interpretations of the Florida statute and testimony from the Director of Legal Services for the Florida Department of Insurance to hold that Fla.Stat. ch. 626.988 was enacted to regulate the relationship between insurers and *potential* policyholders or, more broadly, "the insurance-purchasing public at large." (R3-69-12). Specifically, the Florida cases relied on express a concern underlying the statute with overreaching by financial institutions if permitted to sell insurance. The Florida First District Court of Appeals has spoken at least twice on the subject finding that:

> [b]ecause the statute concerns the regulation of insurance, it is a matter within the state's exercise of police power and large discretion is vested in the legislature. . . . Concerns regarding financial institutions' entry into insurance activities, including the prevention of coercion, unfair trade practices, and undue concentration of resources, existed at the time of passage of the statute and remain valid today . . . [A] *legislature could well have decided* that some protection was required.

Glendale Fed. S & L. Ass'n. v. Fla. Dept. of Ins., 587 So.2d 534, 536 n. 1 and 537 (Fla. 1st Dist.Ct.App.1991)

(citations omitted), *rev. denied,* 599 So.2d 656 (Fla. 1992).

> [Moreover,] insurance is an industry affected with a public interest and subject to regulation by the States. The Legislature has determined that there is potential for abuse inherent in financial institutions being involved in the sale of insurance, and that the licensing of employees of financial institutions as insurance agents is not in the public interest.

Prod. Credit Ass'ns. of Fla. v. Fla. Dept. of Ins., 356 So.2d 31, 32 (Fla. 1st Dist.Ct.App.1978).

At trial, the Director of Legal Services for the Florida Department of Insurance, Mr. Shropshire, testified about the need to protect policyholders by regulating the financial stability of insurance companies so that they remain solvent and able to pay claims upon demand, which could be threatened by pressures to make improper insurance decisions. This pressure could force an insurer to assume a bad risk to quickly consummate a bank loan, or could push a bank customer to take out unnecessary insurance where the bank's only motive is profit. While appellant Barnett Marion argues that the statute exists only to protect "independent insurance agents from competition by financial institutions," Appellant's Brief at 35, we disagree. The danger in these situations, as the trial court correctly points out, is the loss of arms-length transactions and objectivity when the bank becomes involved with insurer and insured. "The maintenance of this relationship is for the protection of the solvency of the insurance industry, and the prevention of coercion, which in turn protects all potential, present and future policyholders." (R3-69-16).

Relying on the state court interpretations, testimony at trial, reference in the Florida statute to McCarran-Ferguson, and explicit instruction from the United States Su-

preme Court in *Nat'l Securities* that regulatory protection of policyholders may be indirect, 393 U.S. at 460, 89 S.Ct. at 568-69, the trial court found that Fla.Stat. ch. 626.988 regulates the business of insurance because it protects policyholders. We agree. "Under the terms of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), therefore, federal law must yield to the extent the [state] statute furthers the interests of policyholders." *Fabe,* —— U.S. at ——, 113 S.Ct. at 2208.

3. Section 92

"State laws enacted 'for the purpose of regulating the business of insurance' do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise." *Fabe,* —— U.S. at ——, 113 S.Ct. at 2211. The question now is whether section 92 specifically requires otherwise. To answer this question, we examine the section's history.

In 1863 the Civil War Congress enacted the National Bank Act, which it then reenacted in 1864. The Act created federally chartered national banks and empowered them to issue and accept a uniform national currency. One section of the National Bank Act limited the indebtedness of national banks. In 1874, Congress revised, reorganized, and reenacted all statutes in effect at the time, including this indebtedness provision, and simultaneously repealed all prior statutes. With minor stylistic changes, Title 62 of the Revised Statutes § 5202 contained the National Bank Act's indebtedness provision.

In 1913, Congress amended Rev.Stat. § 5202 to include a fifth exception to the indebtedness provision. The amendment was a detail of the Federal Reserve Act of 1913, which created Federal Reserve banks and the Federal Reserve Board, and required national banks to become members of the new Federal Reserve System. Finally, in 1916, Congress enacted what we today call section 92.

One portion of section 92 authorized national banks located and doing business in places with fewer than five thousand inhabitants, as shown by the last decennial census, to be agents for any fire, life, or other insurance company authorized to do business in the State where the bank is located.

Two years later, however, Congress repealed all of § 5202 except the indebtedness provision. The story, however does not end here. In 1982, Congress, actually amended section 92. See Garn-St. Germain Depository Institutions Act of 1982, § 403(b), 96 Stat. 1511; see also Competitive Equality Banking Act of 1987, § 201 (b)(5), 101 Stat. 582 (imposing a one-year moratorium on section 92 activities). Amid confusion over whether section 92 still lived, the Supreme Court tackled the issue in *United States Nat'l Bank of Or. v. Indep. Ins. Agents*, —— U.S. ——, 113 S.Ct. 2173, 124 L.Ed.2d 402 (1993). Finding the apparent repeal of section 92 to have been mere scrivener's error in placing section 92 in the Rev.Stat. § 5202 rather than the Federal Reserve Act, as the Court divined Congress had intended, the Supreme Court held section 92 had escaped repeal.[2]

Although *Nat'l Bank of Or.* did not address whether section 92 relates to insurance, it did emphasize at length the relation between section 92 and both the National Bank Act and the Federal Reserve Act, neither of which suggests section 92 relates specifically to insurance or was a specific attempt to preempt state insurance laws. Both Acts concern banking, not insurance. Moreover, Congress enacted section 92 "at a time when the business of insurance was believed to be beyond the reach of Congress' power under the Commerce Clause." *Fabe*,

[2] All of the above history of section 92 and the National Bank Act is taken in compacted form from *Nat'l Bank of Or.*, —— U.S. ——, 113 S.Ct. 2173 (1993). For a more detailed discussion replete with citations and authorities, see Justice Souter's opinion for a unanimous Court, *id.* at ——-——, 113 S.Ct. at 2179-82.

—— U.S. at ——, 113 S.Ct. at 2212. As the trial court pointed out, "[e]ven *South-Eastern Underwriters*, which briefly altered the preemption landscape, noted that prior to 1944 Congress 'at no time' had attempted to control the business of insurance." (R3-69-18) (citing 322 U.S. at 544, 64 S.Ct. at 1168-69). Before 1944, both Congress and the Supreme Court understood *Paul v. Virginia*, 78 U.S. (8 Wall.) 168, 183, 19 L.Ed. 357 (1868), to place insurance outside the Commerce Clause power. Accordingly, when Congress enacted section 92 in 1916—nearly 30 years before *South-Eastern Underwriters*—Congress could not have been attempting to regulate a business that it believed it had no power to regulate. Congress was concerned with banking, not insurance.

This Court concludes that section 92 neither "specifically relates to the business of insurance," 15 U.S.C. § 1012 (b), nor "specifically requires," *Fabe*, —— U.S. at ——, 113 S.Ct. at 2211, that apparently conflicting state laws be preempted. Accordingly, under McCarran-Ferguson, Fla.Stat. ch. 626.988 need not yield to section 92. Based on this determination that Fla.Stat. ch. 626.988 may proscribe national-bank subsidiaries from conducting insurance activities within Florida, we do not reach the issues of whether, if such banks could sell insurance, they could do it nationally.

V. CONCLUSION

We hold that the district court correctly interpreted both the federal and state statutes at issue in this case. Further, we hold that the district court's findings of fact were not clear error. We AFFIRM.

AFFIRMED.

APPENDIX K

COURT OF APPEALS OF LOUISIANA
FIRST CIRCUIT

No. 94 CA 0813

FIRST ADVANTAGE INSURANCE, INC. and
FIRST NATIONAL BANK OF DENHAM SPRINGS

v.

THE HONORABLE DOUGLAS D. GREEN,
Commissioner of Insurance,
State of Louisiana

March 3, 1995

Before LOTTINGER, C.J., and SHORTESS and CARTER, JJ.

CARTER. Judge.

This is an appeal from a trial court judgment on a petition for review, affirming an administrative ruling revoking the license of First Advantage Insurance, Inc. (First Advantage) to act as a general insurance agent.

BACKGROUND

The following facts were stipulated to by the parties:

1. First Denham Bancshares, Inc. is a federally regulated bank holding company subject to the authority of the Board of Governors of the Federal Reserve System.

2. First National Bank of Denham Springs is a national banking association holding Charter Number 15344, issued by the Comptroller of the Currency, Treasury Department of the United States.

3. First National Bank of Denham Springs is a wholly-owned subsidiary of First Denham Bancshares, Inc.

4. First Advantage Insurance, Inc. is a wholly-owned, non-banking subsidiary of First National Bank of Denham Springs.

5. By letter dated February 27, 1989, First National Bank of Denham Springs sought the Comptroller's approval to "establish an operating subsidiary, to engage in general de novo insurance activities in communities in which the bank has full service branches and a population of which is less than 5,000 inhabitants."

6. By letter dated March 22, 1989, the Office of the Comptroller of the Currency ("OCC") approved the establishment of First Advantage Insurance, Inc. by First National Bank of Denham Springs. The OCC letter stated, inter alia, that First Advantage Insurance, Inc. could "sell insurance as agent to existing and potential customers regardless of where the customers are located."

7. First Advantage Insurance, Inc. is a Louisiana corporation in good standing.

8. First Advantage Insurance, Inc. holds license number 181589 from the Commissioner of Insurance, State of Louisiana.

9. First National Bank of Denham Springs has its prinpal offices in the City of Denham Springs and has branches in the City of Denham Springs, Springfield, Walker, French Settlement, Albany, and Watson, Louisiana. Only the City of Denham Springs has a population in excess of 5,000 inhabitants.

10. First Advantage Insurance, Inc. is not presently marketing or selling insurance as agent due to the pendency of this administrative proceeding.

11. First National Bank of Denham Springs through First Advantage Insurance, Inc. plans to pursue all insurance agent powers that they believe to be law ful.

12. Robert Alton Seals, Jr. has been a licensed insurance agent for approximately thirteen (13) years and is Vice President and Manager of First Advantage Insurance, Inc. During all of the time that Mr. Seals has been affiliated with First Advantage, he has also been Assistant Vice President and Trust Officer of the First National Bank of Denham Springs.

13. The Louisiana Association of Life Underwriters is a non-profit association representing life insurance agents and is a member of the National Association of Life Underwriters. The Independent Insurance Agents of Louisiana, Inc., is a member of the Independent Insurance Agents of America, Inc. and is a non-profit association representing insurance agents who primarily sell property and casualty insurance, but whose members also sell life insurance and annuities. The Professional Insurance Agents of Louisiana, Inc. is an affiliate of National Association of Professional Insurance Agents, Inc. and is a non-profit association representing insurance agents who primarily sell property and casualty insurance, but whose members also sell life insurance and annuities.

14. By letter dated May 24, 1988, First Denham Bancshares, Inc. sought approval of the Board of Governors of the Federal Reserve System to engage in general insurance agency activities in two Louisiana towns, each with a population of fewer than 5,000 residents, according to the 1980 census.

15. By letter dated November 21, 1988, the Independent Insurance Agents of America, Inc. et al, notified the Board of Governors of the Federal Reserve System of no objection to the application of First Denham Bancshares, Inc. subject to the small town exemption provided by law, 12 USC Section 1843 (c)(8)(C)(i) and so long as the geographic limitations that the Board has applied pursuant to that provision were complied with by the applicant.

16. William D. Waldrep, Sara G. Daniel, Michael Atkinson, James F. Patrick and Roy Morgan, all employees of First National Bank of Denham Springs, are licensed by the Commissioner of Insurance, State of Louisiana, to act as life, health and accident insurance agents, in addition to Robert A. Seals, Jr.

17. First National Bank of Denham Springs is only engaged and will only be engaged in the sale of credit related insurance as described in La.R.S. 6:242 A. (6).

18. First Advantage plans to open its office in Walker, Louisiana, and sell insurance from this office. First Advantage may open offices later in Watson, Springfield, French Settlement and/or Albany and sell insurance therefrom.

19. First Advantage may market its insurance products through the following methods: (1) direct mail, with or without geographic limitation, to potential customers, including present customers of First National Bank of Denham Springs; (2) radio advertising through stations whose coverage area is shown on Exhibits 9, 10 and 11, as well as other stations whose coverage area includes Livingston Parish; (3) cable television systems that transmit to and within Livingston Parish or parts thereof, including Denham Springs; and (4) newspaper advertising through the *Denham Springs News*, which is published in

Denham Springs, Louisiana. The inclusion of these possible marketing methods herein is not intended nor shall it be construed to be an agreement that such is either legally permissible or believed to be legally permissible.

20. The positions of the Comptroller of the Currency and the Office of Financial Institutions are contained within Exhibits 12 and 13 without any agreement between the parties as to the correctness thereof.

21. The present officers of First Advantage are: Robert E. Easterly, President; Ruben Spillman, Sr., Secretary; Oscar P. Waldrep, Jr., Treasurer; and Robert Seals, Jr., Senior Vice President and Manager. R. Dawes Easterly, Ruben Spillman, Sr. and Oscar P. Waldrep, Jr. are the directors of First Advantage. The directors of First Advantage and Robert E. Easterly are also directors of First National Bank of Denham Springs and First Denham Bancshares, Inc., both of which corporations has the same nine (9) directors. R. Dawes Easterly is Chairman and Chief Executive Officer of First Denham Bancshares, Inc., and Robert E. Easterly is President of First Denham Bancshares, Inc. and President and Chief Executive Officer of First National Bank of Denham Springs.

22. First Advantage was the agent of record for the group life insurance policy on employees of First National Bank of Denham Springs from June 1, 1990 through August 1, 1990. First Advantage was the agent of record for the group health and accident insurance policy of First National Bank of Denham Springs from July 1, 1990 through August 31, 1990. Due to the pendency of this proceeding, First National Bank of Denham Springs changed its agent of record for each policy of insurance described herein effective September 1, 1990.

The parties make no contention that First Advantage is ineligible to act as an insurance agent due

to non-activity pending resolution of this matter nor that First Advantage was created solely to write insurance coverage for which its employees are beneficiaries.

FACTS

On or about August 2, 1990, First National Bank of Denham Springs (First National) and First Advantage received notice of a hearing from the Commissioner of Insurance (Commissioner). In the notice, the Commissioner ordered First National and First Advantage to show cause why the insurance agent license of First Advantage should not be revoked. The Commissioner alleged that First Advantage was violating LSA-R.S. 22:1214(12)[1] and 22:1121[2] and specifically the Louisiana Insurance Unfair Trade Practices Act by acting as an agent in violation of the state banking laws, in particular LSA-R.S. 6:121B(2), 6:242A(6), and 6:513.

After a hearing, the hearing officer incorporated the joint stipulation of facts into his ruling and determined that, although the National Bank Act and the Bank Holding Company Act permit national banks and subsidiaries of national banks to sell insurance in towns with a population of less than 5,000 inhabitants, such authority is subject to state regulation. Because state law, specifically LSA-R.S. 6:121B, prohibits any bank,[3] bank holding company, or subsidiary to engage in any insurance activity

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[1] LSA-R.S. 22:1214(12) declares that any violation of any prohibitory law of this state is an unfair method of competition and unfair or deceptive act or practice in the business of insurance.

[2] LSA-R.S. 22:1121 relates to the refusal, suspension, or revocation of licenses and to the imposition of fines. By Acts 1993, No. 952, § 2, effective, January 1, 1994, LSA-R.S. 22:1121 was repealed, and the provisions relating to the refusal, suspension, or revocation of licenses and to the imposition of fines are now set forth in LSA-R.S. 22:1114 and 22:1115.

[3] LSA-R.S. 6:2(1) defines a "bank" as "any state bank or any national bank."

except as specifically provided in LSA-R.S. 6:242A(6), the only insurance activity in which a bank may engage is the sale of credit life and credit health and accident insurance to its customers. Accordingly, the hearing officer determined that the insurance agent license of First Advantage was limited in accordance with the provisions of the ruling, either by amendment or the issuance of a new license, and First Advantage's license to act as a full life agent was revoked.

On January 16, 1991, First Advantage and First National filed a petition for judicial review, seeking a reversal of the Commissioner's order and a reinstatement of First Advantage's license. On November 3, 1993, the Louisiana Association of Life Underwriters (LALU), the Professional Insurance Agents of Louisiana (PIAL), and the Independent Insurance Agents of Louisiana (IIAL) filed a petition of intervention. The Louisiana Bankers Association filed an *amicus curiae* brief in support of the request for review of the administrative determination revoking First Advantage's general insurance agent license to sell life, health, and accident insurance.

After a hearing, the trial court rendered judgment, affirming the decision of the hearing officer and dismissing First National's and First Advantage's petition for review at their costs. The judgment was signed on December 21, 1993.

From this adverse judgment, First Advantage and First National appeal, assigning the following errors: [4]

> 1. The trial court committed clear error in its decision, reflecting a total misunderstanding of appellants' argument and thus the decision below is entitled to no weight on review.

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[4] Although the opinion does not address each assignment of error individually, the opinion adequately disposes of all of the issues raised.

2. The trial court applied an erroneous test for preemption and erred as a matter of law.

3. The court erred in holding First Advantage's insurance powers are prohibited as an indirect subsidiary of a bank holding company.

4. The lower court denied equal protection of the law to plaintiffs-appellants.

PREEMPTION

The preemption doctrine has its roots in the Supremacy Clause, U.S. Const. Art. VI, cl. 2. It is well settled that the Supremacy Clause of the United States Constitution (Article VI, clause 2) invalidates state laws that "interfere with, or are contrary to" federal law. *See Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 712, 105 S.Ct. 2371, 2375, 85 L.Ed.2d 714 (1985); *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S.Ct. 2114, 2129, 68 L.Ed.2d 576 (1981). Basic to this constitutional command is the notion that all state provisions which conflict with federal law are without effect. *See Maryland v. Louisiana*, 451 U.S. at 747, 101 S.Ct. at 2129, 68 L.Ed.2d 576.

Preemption may be either express or implied and is compelled whether Congress's command is explicitly stated in the statute's language or implicitly contained in its structure and purpose. *Fidelity Federal Savings and Loan Association v. de la Cuesta*, 458 U.S. 141, 152-53, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982); *Jones v. Rath Packing Company*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977); *Massachusetts Medical Society v. Dukakis*, 815 F.2d 790, 791 (1st Cir.1987), *cert. denied*, 484 U.S. 896, 108 S.Ct. 229, 98 L.Ed.2d 188 (1987). Consideration under the Supremacy Clause begins with the basic assumption that Congress did not intend to displace state law. But, as the Supreme Court pointed out in *Rice v. Santa Fe*

Elevator Corporation, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947):

> Such a purpose [to displace state law] may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. Or the state policy may produce a result inconsistent with the objective of the federal statute. (citations omitted).

Hillsborough County, Florida v. Automated Medical Laboratories, Inc., 471 U.S. at 713, 105 S.Ct. at 2375, 85 L.Ed.2d 714. A state statute is also void to the extent it conflicts with federal law—if, for example, "compliance with both federal and state regulations is a physical impossibility," *Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 471 U.S. at 713, 105 S.Ct. at 2375, 85 L.Ed.2d 714; *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43, 83 S.Ct. 1210, 1217-18, 10 L.Ed.2d 248 (1963), or where the law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 471 U.S. at 713, 105 S.Ct. at 2375, 85 L.Ed.2d 714; *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941). *See Maryland v. Louisiana*, 451 U.S. at 747, 101 S.Ct. at 2129, 68 L.Ed.2d 576.

In the instant case, the Louisiana statutes and federal statute at issue are LSA-R.S. 6:121B(2), 6:242A(6), and 6:513 and 12 U.S.C. § 92, respectively.

LSA-R.S. 6:121B(2)[5] provides as follows:

> Notwithstanding any other provision of this Title, the commissioner shall not authorize any bank, bank holding company, or subsidiary thereof to engage in any insurance activity except an insurance activity in which a bank may engage pursuant to the provisions of R.S. 6:242(A)(6). However, any bank which was engaged as a general insurance agent or broker on January 1, 1984, may continue to be so engaged. (emphasis added.)

LSA-R.S. 6:242A(6)[6] provides as follows:

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[5] Acts 1990, No. 611, § 1, effective July 19, 1990, amended and reenacted LSA-R.S. 6:121B(2), 6:242A(6), and 6:513(3), relative to insurance activities by banks, bank holding companies, or subsidiaries thereof to limit such activity in the event a bank, bank holding company, or subsidiary thereof acquired another bank, bank holding company, or subsidiary thereof, which is authorized to engage in insurance activities. LSA-R.S. 6:121B(2) was amended to provide as follows:

> Notwithstanding any other provision of this Title, the commissioner shall not authorize any bank, bank holding company, or subsidiary thereof to engage in any insurance activity except an insurance activity in which a bank may engage pursuant to the provisions of R.S. 6:242(A)(6). However, any bank which was engaged as a general insurance agent or broker on January 1, 1984, may continue to be so engaged. If such bank is acquired after January 1, 1984, by another bank, bank holding company, or subsidiary thereof, the insurance agency activities of the surviving bank, bank holding company, or subsidiary thereof shall be limited to insurance activities for persons who are domiciled in or who own property in the parish where the acquired bank maintained its principal office. However, the surviving bank, bank holding company, or subsidiary thereof may continue to engage in insurance activities for any person who was insured by such bank on July 19, 1990.

[6] Acts 1990, No. 611, § 1, effective July 19, 1990, amended and reenacted LSA-R.S. 6:121B(2), 6:242A(6), and 6:513(3), relative to insurance activities by banks, bank holding companies, or subsidiaries thereof to limit such activity in the event a bank, bank holding company, or subsidiary thereof acquired another bank,

A. In addition to the general corporate powers conferred in R.S. 6:241 and the powers conferred by other provisions of the laws of this state, a state bank shall have the following banking powers and those incidental to the exercise of these powers:

> (6) To act as the agent for any insurance company authorized to do insurance business in this state by soliciting and selling insurance, but only with respect to credit insurance which, within the terms and conditions authorized by law, is limited to assuring repayment or partial repayment of the outstanding

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bank holding company, or subsidiary thereof, which is authorized to engage in insurance activities. LSA-R.S. 6:242A(6) was amended to provide as follows:

> (6)(a) To act as the agent for any insurance company authorized to do insurance business in this state by soliciting and selling insurance, but only with respect to credit insurance which, within the terms and conditions authorized by law, is limited to assuring repayment of partial repayment of the outstanding balance due on a specific extension of credit by a bank in the event of the death, disability, or involuntary unemployment of the debtor and collecting premiums on those policies issued through the bank by such insurance company; and to receive for services so rendered such commissions or fees as may be agreed upon between the bank and the insurance company for which it is acting as agent. Notwithstanding any other provisions of this Title, no bank shall engage or be authorized to engage in any insurance activity that is not expressly permitted by this Paragraph.
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> (b) Nothing contained in this Title shall prohibit any bank which was engaged as a general insurance agent or broker on January 1, 1984, from continuing to be so engaged. If such bank is acquired after January 1, 1984, by another bank, bank holding company, or subsidiary thereof, the insurance agency activities of the surviving bank, bank holding company, or subsidiary thereof shall be limited to insurance activities for persons who are domiciled in or who own property in the parish where the acquired bank maintained its principal office. However, the surviving bank, bank holding company, or subsidiary thereof may continue to engage in insurance activities for any person who was insured by such bank on July 19, 1990.

balance due on a specific extension of credit by a bank in the event of the death, disability, or involuntary unemployment of the debtor and collecting premiums on those policies issued through the bank by such insurance company; and to receive for services so rendered such commissions or fees as may be agreed upon between the bank and the insurance company for which it is acting as agent. Notwithstanding any other provisions of this Title, no bank shall engage or be authorized to engage in any insurance activity that is not expressly permitted by this Subsection (A)(6). Nothing contained in this Subsection or in any other Section or Subsection of this Title shall prohibit any bank which was engaged as a general insurance agent or broker on January 1, 1984, from continuing to be so engaged. (emphasis added.)

LSA-R.S. 6:513 [7] provides that it is unlawful:

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[7] Acts 1990, No. 611, § 1, effective July 19, 1990, amended and reenacted LSA-R.S. 6:121B(2), 6:242A(6), and 6:513(3), relative to insurance activities by banks, bank holding companies, or subsidiaries thereof to limit such activity in the event a bank, bank holding company, or subsidiary thereof acquired another bank, bank holding company, or subsidiary thereof, which is authorized to engage in insurance activities. LSA-R.S. 6:513 was amended to provide as follows:

It shall be unlawful:

(1) Until July 1, 1989, for any bank holding company or subsidiary thereof to open for business any bank not now opened for business whether or not a charter, permit, license, or certificate to open for business has already been issued.

(2) For any company to become a bank holding company unless the primary purpose of the corporation is the ownership or control of one or more banks.

(3) For any bank holding company or subsidiary thereof to engage in any insurance activity except an insurance activity in which a bank may engage, provided that if a bank holding company or subsidiary thereof acquires a bank that was engaged as a general insurance agent or broker on January 1,

(1) Until July 1, 1989, for any bank holding company or subsidiary thereof to open for business any bank not now opened for business whether or not a charter, permit, license, or certificate to open for business has already been issued.

(2) For any company to become a bank holding company unless the primary purpose of the corporation is the ownership or control of one or more banks.

(3) For any bank holding company or subsidiary thereof to engage in any such insurance activity except an insurance activity in which a bank may engage. (emphasis added.)

12 U.S.C. § 92 [8] provides as follows:

1984, the insurance activities of the surviving bank, bank holding company, or subsidiary thereof shall be limited to insurance activities for persons who are domiciled in or who own property in the parish where the acquired bank maintained its principal office. However, the surviving bank, bank holding company, or subsidiary thereof may continue to engage in insurance activities for any person who was insured by such bank on July 19, 1990.

[8] As noted in the Historical and Statutory Notes to 12 U.S.C. § 92, this section is based on the ninth paragraph of section 13 of Act December 23, 1913, as amended in 1916. The remaining paragraphs of section 13 are classified to sections 342 to 347, 347c, 347d, 361, 372, and 373 of this title. The notes further provide:

Faulty placement of quotation marks in the provisions of Act Sept. 7, 1916, c. 461, 39 Stat. 753, which enacted this section, erroneously indicated that this section was enacted as an addition to R.S. § 5202 and not as an addition to section 13 of the Federal Reserve Act (Act Dec. 23, 1913, c. 6, § 13, 38 Stat. 263). Thus, when Congress amended R.S. § 5202 in 1918 (Act Apr. 5, 1918, c. 45, § 20, 40 Stat. 512) and omitted any mention of the provisions of this section, it appeared that the Congressional intent was to omit this section. However, see *United States National Bank of Oregon v. Independent Insurance Agents of America*, June 7, 1993, U.S. Supreme Court, No. 92-484 [—— U.S. ——, 113

> In addition to the powers now vested by law in national banking associations organized under the laws of the United States any such association located and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company; and may receive for services so rendered such fees or commisisons as may be agreed upon between the said association and the insurance company for which it may act as agent: *Provided, however,* That no such bank shall in any case assume or guarantee the payment of any premium on insurance policies issued through its agency by its principal: *And provided further,* That the bank shall not guarantee the truth of any statement made by an assured in filing his application for insurance. (emphasis added.)

A cursory reading of these statutes reveals that 12 U.S.C. § 92 permits national banks located in places where the population does not exceed five thousand inhabitants to "act as agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State." However, the provisions of Title 6 under Louisiana law, specifically LSA-R.S. 6:121B(2), 6:242A(6), and 6:513, limit the ability of banks and bank holding companies to engage in any insurance activity, except

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S.Ct. 2173, 124 L.Ed.2d 402], holding that the faulty placement of quotation marks was a simple scrivener's error and that this section had not been repealed by the 1918 enactment.

those activities involving credit life and credit health and accident insurance.

Therefore, because Section 92 authorizes national banks to sell all types of insurance in towns of less than 5,000 inhabitants and the laws of the State of Louisiana limit the ability of all banks, including national banks, to engage in any insurance activity, except credit-related insurance, we conclude that, under a conventional preemption analysis, 12 U.S.C. § 92 may preempt LSA-R.S. 6:121B (2), 6:242A(6), and 6:513. However, our inquiry does not end here.

A. McCarran-Ferguson

We must next determine whether the McCarran-Ferguson Act "immunizes" or "saves" LSA-R.S. 6:121B(2), 6:242A(6), and 6:513 from preemption by 12 U.S.C. § 92. The relevant portion of the McCarran-Ferguson Act states that:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, . . . unless such Act specifically relates to the business of insurance.

15 U.S.C. § 1012(b).

The McCarran-Ferguson Act was passed by Congress in 1945 in response to the United States Supreme Court's decision in *United States v. South-Eastern Underwriters Association*, 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944). Prior to that decision, pursuant to *Paul v. Commonwealth of Virginia*, 75 U.S. 168, 183, 19 L.Ed. 357, 8 Wall. 168 (1868), issuing a policy of insurance was not a transaction of commerce, and, as such, was not subject to federal regulation. In *United States v. South-Eastern Underwriters Association*, 322 U.S. at 539, 64 S.Ct. at 1166, 88 L.Ed. 1440, the United States Supreme Court noted that the "modern insurance business holds a com-

manding position in the trade and commerce of our Nation," and held for the first time that insurance activities conducted across state lines were subject to regulatory power of Congress under the Commerce Clause and the antitrust laws, in particular. By subsequently enacting the McCarran-Ferguson Act, Congress attempted to turn back the clock to assure that the activities of insurance companies in dealing with their policy holders would remain under state regulation. In other words, McCarran-Ferguson "restore[d] the supremacy of the States in the realm of insurance regulation." *United States Department of Treasury v. Fabe,* —— U.S. ——, ——, 113 S.Ct. 2202, 2207, 124 L.Ed.2d 449 (1993).

The McCarran-Ferguson Act protects Louisiana state law [9] from preemption by federal law,[10] if two factors are satisfied. First, the state statutes, LSA-R.S. 6:121B(2), 6:242A(6), and 6:513, must have been enacted "for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b). Second, the federal statute, 12 U.S.C. § 92, must not "specifically relate to the business of insurance." 15 U.S.C. § 1012(b).

B. Fabe and the Application of 15 U.S.C. § 1012(b).

The analysis for determining whether LSA-R.S. 6:121B(2), 6:242A(6), and 6:513 were enacted for the purpose of regulating the business of insurance is controlled by *United States Department of Treasury v. Fabe,* —— U.S. at ——, 113 S.Ct. at 2207, 124 L.Ed.2d 449. In *Fabe,* the United States Supreme Court held that an Ohio statute was saved from federal preemption to the extent that it regulated the relationship between the insurance company and its policy holders. *United States Department of Treasury v. Fabe,* —— U.S. at ——, 113 S.Ct. at 2208,

[9] The applicable state laws in this case are LSA-R.S. 6:121B(2), 6:242A(6), and 6:513.

[10] In this case, the federal law which seeks to preempt the Louisiana state law in this case is 12 U.S.C. § 92.

124 L.Ed.2d 449. In its analysis, the United States Supreme Court distinguished the first and second clauses of 15 U.S.C. § 1012(b). The first clause, "enacted by any state for the Purpose of regulating the business of insurance," deals with those state laws enacted for the purpose of regulating insurance and saves applicable state laws from federal preemption. The second clause, on the other hand, exempts from preemption only "the business of insurance" itself from the anti-trust laws. *United States Department of Treasury v. Fabe,* —— U.S. at ——, 113 S.Ct. at 2209, 124 L.Ed.2d 449. Citing Black's Law Dictionary 1236, 1238 (6th ed. 1990), the United States Supreme Court noted that the broad category of laws enacted "for the purpose of regulating the business of insurance" consists of laws that possess the "end, intention, or aim" of adjusting, managing, or controlling the business of insurance. *United States Department of Treasury v. Fabe,* —— U.S. at ——, 113 S.Ct. at 2210, 124 L.Ed.2d 449. The United States Supreme Court then explained that this category necessarily encompassed more than just "the business of insurance." Thus, the Supreme Court explicitly distinguished the first clause of 15 U.S.C. § 1012(b) from the second clause, making it clear that the first clause "is not so narrowly circumscribed" as the second clause. *United States Department of Treasury v. Fabe,* —— U.S. at ——-——, 113 S.Ct. at 2209-10, 124 L.Ed.2d 449.

Moreover, in *Fabe,* the United States Supreme Court disputed the allegation that it was violating a basic rule of statutory construction "that identical words used in different parts of the same act are intended to have the same meaning," namely that the term "business of insurance" as used in the first and second clauses of 15 U.S.C. § 1012(b) should be ascribed the same meaning. *United States Department of Treasury v. Fabe,* —— U.S. at —— n. 6, 113 S.Ct. at 2210 n. 6, 124 L.Ed.2d 449. The United States Supreme Court acknowledged that "[t]his argument might be plausible if the two clauses

actually employed identical language," but the first clause 15 U.S.C. § 1012(b) uses the term "purpose," which is significantly absent from the second clause. *United States Department of Treasury v. Fabe,* —— U.S. at —— n. 6, 113 S.Ct. at 2210 n. 6, 124 L.Ed.2d 449. However, the failure to distinguish the first clause from the second overlooks another maxim of statutory construction, namely "that a court should 'give effect, if possible, to every clause and word of a statute.'" *U.S. Department of Treausry v. Fabe,* —— U.S. at —— n. 6, 113 S.Ct. at 2210 n. 6, 124 L.Ed.2d 449.

Therefore, in applying the analysis as set forth in *Fabe,* we must examine the specific provisions of the Louisiana state statutes, namely LSA-R.S. 6:121B(2), 6:242A(6), and 6:513, to determine whether those state statutes were enacted for the purpose of regulating the business of insurance.

1. Were LSA-R.S. 6:121B(2), 6:242A(6), and 6:513, enacted for the purpose of regulating the business of insurance?

In *Securities and Exchange Commission v. National Securities, Inc.,* 393 U.S. 453, 460, 89 S.Ct. 564, 568-69, 21 L.Ed.2d 668 (1969), the United States Supreme Court noted that the first clause of Section 2(b) of McCarran Ferguson, i.e. "for the purpose of regulating the business of insurance," was aimed at:

> The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the "business of insurance." Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder. Statutes

> aimed at protecting or regulating this relationship, directly or indirectly are laws regulating the "business of insurance."

393 U.S. at 460, 89 S.Ct. at 568-69, 21 L.Ed.2d 668.

In the instant case, LSA-R.S. 6:121B(2), 6:242A(6), and 6:513 seek to limit or restrict a bank or bank holding company from engaging in any insurance activity not specifically authorized by state statute. The only authorized insurance activity in which a bank, and therefore a bank holding company, may engage is the sale of credit-related insurance. These state statutory provisions were enacted by the state legislature to protect and regulate the relationship between insurer and insured at a very basic level by barring a certain industry, namely the banking industry, from selling all types of insurance. The legislature was apparently concerned that, if banks were licensed to sell all types of insurance, including fire, life, automobile, homeowners, etc., then consumers may feel coerced into purchasing insurance from the bank in order to obtain a loan regardless of the cost of the premium for such insurance. However, the state legislature permitted the banking industry to sell those credit-related insurances which assure repayment of the banks' outstanding loans to its customers. The state statutory provisions limiting the authority of banks to engage in general insurance sales were enacted out of concern for future policy holders and a desire by the legislature to protect the insurance relationship between insurers and insureds.

Clearly, the relationship between insurer and insured, the authority of an individual or entity to sell a certain type of insurance policy, and other activities of individuals or entities acting in the capacity of insurance companies relate so closely to their status as reliable insurers that they must be placed in the same class as the types of activities that are at the core of the "business of insurance." Regardless of the scope of the statutory

provisions and their placement in the Banking Code, it is clear that the focus of the Louisiana state statutes, namely LSA-R.S. 6:121B(2), 6:242A(6), and 6:513, was on the relationship between the insurance company and the policy holder. Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the business of insurance.

Moreover, although LSA-R.S. 6:121B(2), 6:242A(6), and 6:513 are not located in the state Insurance Code and are located in the state Banking Code, the placement of a statute is not a controlling detriment as to its purpose. As the United States Supreme Court noted in *United States Department of Treasury v. Fabe*, —— U.S. at ——, 113 S.Ct. at 2210, 125 L.Ed.2d 449, quoting *Securities and Exchange Commission v. National Securities, Inc.*, 393 U.S. at 460, 89 S.Ct. at 569, "mere matters of form need not detain us." It is sufficient that the state legislature undertook to regulate insurance generally for specific statutes to fall within the meaning of McCarran-Ferguson. The McCarran-Ferguson Act's "state regulation" requirement is satisfied by the general undertaking by a state to regulate the insurance industry. *See Federal Trade Commission v. National Casualty Company*, 357 U.S. 560, 564, 78 S.Ct. 1260, 1262, 2 L.Ed.2d 1540 (1958).

Based on the above, we find that LSA-R.S. 6:121B (2), 6:242A(6), and 6:513 were clearly enacted to regulate the business of insurance. We must next determine whether the federal statute, 12 U.S.C. § 92, specifically relates to the business of insurance.

2. Does the federal statute, 12 U.S.C. § 92, "specifically relate to the business of insurance."

The legislative history of Section 92 reveals that the provision was enacted to strengthen small national banks by providing them with an additional source of revenue. *Owensboro National Bank v. Moore*, 803 F.Supp. 24,

34-35 (E.D.Ky.1992). However, the granting of power to national banks which involves insurance does not transform this section into a regulation of the business of insurance. *Owensboro National Bank v. Moore*, 803 F. Supp. at 36. Moreover, although the United States Supreme Court has not been explicit on how specific a federal statute must be to preempt a state law which regulates the business of insurance, in *United States Department of Treasury v. Fabe*, —— U.S. at ——, 113 S.Ct. at 2211, 124 L.Ed.2d 449, the United States Supreme Court determined that McCarran-Ferguson calls for a "clear-statement rule." According to this rule, a federal statute, such as 12 U.S.C. § 92, must "clearly state" that it regulates the business of insurance or otherwise intends to preempt a contrary state law. *United States Department of Treasury v. Fabe*, —— U.S. at ——, 113 S.Ct. at 2211, 124 L.Ed.2d 449. This scheme creates a reverse-preemption doctrine for insurance regulation in that a state statute that regulates insurance presumptively preempts a contrary Congressional statute unless the Congressional statute specifically relates to the business of insurance. *Barnett Bank of Marion County, N.A. v. Gallagher*, 43 F.3d 631 (11th Cir. (Fla.)), decided 1/30/95.

Examining the language of 12 U.S.C. § 92, we find that there is nothing in the language to indicate that it regulates the business of insurance. Section 92 is silent as to its effect on state insurance law. There is no language contained therein which expresses congressional intent that it preempts state insurance laws to the contrary. Congress did not expressly state that it intended to preempt the states' traditional power to prohibit insurance activities in their small towns. Instead, Congress merely stated that, in addition to their "shall" powers, national banks "may" act as insurance agents in small towns. The use of the more lenient word "may" in Section 92 supports the notion that Congress did not intend that national banks necessarily be able to sell insurance in small towns. Moreover, Section 92 does not expressly

state that it relates to the business of insurance. Other than the provision that national banks may act as insurance agents in small towns, there is no other language in Section 92 dealing with insurance or the regulation thereof. Further, the context of Section 92 has always been within the regulation of banking rather than the regulation of insurance. As such, we find that Section 92 does not specifically relate to the business of insurance.

In enacting other types of legislation involving insurance and/or the regulation thereof, Congress has been quite explicit, although not always clear, on its intent to preempt contrary state law. In ERISA, for example, Congress clearly set forth its preemptive intent and therefore the preemptive effect of the federal statute. ERISA, unlike Section 92, expressly directs that the statute "shall supersede any and all State laws insofar as they may now or hereafter relate to any employment benefit plan." 29 U.S.C. § 1144(a). In *John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank*, —— U.S. ——, ——, 114 S.Ct. 517, 526, 126 L.Ed.2d 524 (1993), the United States Supreme Court applied traditional principles to interpret the scope of the ERISA preemption provisions, but only after it was clear, under the McCarran analysis, that Congress intended to preempt state law.

Certainly, in enacting Section 92, if Congress had intended to regulate the business of insurance and preempt state laws, Congress could have included language to that effect. For example, Congress could have stated that national banks may act as insurance agents in small towns without compliance with state insurance laws. However, Congress did not include such a provision. Instead, in enacting Section 92, Congress stated that national banks "may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance

company authorized by the authorities of the State in which said bank is located to do business in said State." (emphasis added.) This language manifests Congressional intent that such small town national banks, which chose to act as general insurance agents, do so as authorized by the state laws in which the banks were located. Clearly, this language manifests a contrary intent by Congress, namely, that national banks must comply with the insurance laws of the state in which they operate.

Under federal law, national banks in Louisiana have the capability to sell insurance from locations in small towns; however, this right is not unfettered. The State of Louisiana can still oversee the sales of insurance through reasonable licensing requirements applicable to all entities acting as agents for the sale of insurance in Louisiana. In Louisiana, state laws regulating insurance prohibit banks, both state and national, to act as agents for the sale of all types of insurance, except credit-related insurance.

Because 12 U.S.C. § 92 does not specifically relate to the business of insurance, state laws, namely LSA-R.S. 6:121B(2), 6:242A(6), and 6:513, enacted for the purpose of regulating the business of insurance do not yield to the federal statute. Further, there is no "clear statement" that 12 U.S.C. § 92 intends to regulate the business of insurance or otherwise intends to preempt state law. Therefore, we find that the McCarran-Ferguson Act saves LSA-R.S. 6:121B(2), 6:242A(6), and 6:513 from preemption by 12 U.S.C. § 92.

C. Conflict in Federal Courts.

At the time the parties filed their initial briefs, two United States district courts had addressed similar federal preemption issues involving state insurance provisions, from which appeals were taken. *See Barnett Banks of Marion County, N.A. v. Gallagher,* 839 F.Supp. 835 (M.D.Fla.1993), and *Owensboro National Bank v.*

Moore, 803 F.Supp. at 24. Since the docketing of the instant appeal, two United States Courts of Appeal have rendered decisions on those appeals. The Sixth Circuit Court of Appeals has rendered a decision in *Owensboro National Bank v. Stephens*, 44 F.3d 388 (6th Cir. (Ky.)), decided 12/29/94, and the Eleventh Circuit Court of Appeal has rendered a decision in *Barnett Bank of Marion County, N.A. v. Gallagher*, 43 F.3d 631 (11th Cir. (Fla.)), decided 1/30/95.

1. Owensboro National Bank v. Stephens

In *Owensboro* the U.S. appellate court for the Sixth Circuit, in a split decision, addressed whether a Kentucky state statute, which sought to restrict banks from acting as insurance agents for any insurance other than credit-related insurance, was preempted by Section 92.[11] The court concluded that, under a conventional preemption analysis, the Kentucky state statute was preempted by Section 92, which allows national banks in towns of fewer than 5,000 persons to act as insurance agents.

In determining whether McCarran-Ferguson immunizes the Kentucky state statute from preemption by Section 92, the court in *Owensboro* considered whether the Kentucky state statute had been enacted for the purpose of regulating the business of insurance. The court noted that the "business of insurance" is made up of "practices" and "activities" that satisfy the criteria set forth in *Union Labor Life Insurance Company v. Pireno*, 458 U.S. 119, 120, 102 S.Ct. 3002, 3004, 73 L.Ed.2d 647 (1982). Under *Pireno*, the criteria are:

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[11] The Kentucky state statute provided as follows:

> No person who after July 13, 1984, owns or acquires more than one-half (1/2) of the capital stock of a bank shall act as insurance agent or broker with respect to any insurance except credit life insurance, credit health insurance, insurance of the interest of a real property mortgagee in mortgage property, other than title insurance.

> [F]irst, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry.

458 U.S. at 120, 102 S.Ct. at 3004, 73 L.Ed.2d 647.

The majority determined that the Kentucky state statute does not possess the requisite aim of regulating activities that meet the *Pireno* criteria. The court noted that the Kentucky state statute defined the powers of Kentucky bank holding companies by excluding such companies from participating in activities that constitute the business of insurance. The majority reasoned that excluding a person or entity from participation in an activity is different from regulating the manner in which the activity is conducted. The former is the regulation of the person; the latter is the regulation of the activity. The court in *Owensboro* then concluded that the Kentucky state statute regulated only persons or entities owning more than one-half of the capital stock of a bank and in no way governed the manner in which the activities constituting the "business of insurance" are conducted.[12] As such, the majority in *Owensboro* found that McCarran-Ferguson did not save the Kentucky state statute from preemption by Section 92.

In a dissenting opinion in *Owensboro,* Judge Alice M. Batchelder opined that the Kentucky state statute was shielded from preemption by Section 92 by the McCarran-Ferguson Act. The dissent found that both factors of the

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[12] Since the court in *Owensboro* concluded that the Kentucky state statute was enacted for the purpose of regulating certain conduct by bank holding companies, not the business of insurance, the court did not determine whether Section 92 specifically related to the business of insurance because, without regard to whether Section 92 relates to the business of insurance, McCarran-Ferguson could not save the Kentucky state statute from preemption.

McCarran-Ferguson Act were satisfied in that the Kentucky state statute was enacted for the purpose of regulating the business of insurance and that Section 92 does not specifically relate to the business of insurance. In refusing to apply the *Pireno* factors, the dissent determined that, although the *Pireno* criteria are relevant in determining the applicability of the antitrust exemption, they are not determinative with respect to the first clause of 15 U.S.C. § 1012(b).[13]

The dissent further determined that the more recent opinion by the United States Supreme Court in *United States Department of Treasury v. Fabe*, —— U.S. at ——, 113 S.Ct. at 2202, 124 L.Ed.2d 449, was applicable. According to the dissent, the United States Supreme Court in *Fabe* distinguished between the first and second clauses of 15 U.S.C. 1012(b). The first clause of Section 1912(b) deals with state laws enacted for the purpose of regulating the business of insurance and saves applicable state laws from preemption. On the other hand, the second clause exempts from preemption only the business of insurance from the antitrust laws.

In applying the McCarran-Ferguson analysis to the Kentucky state statute, the dissent found that the statute was enacted to regulate the business of insurance. In support of this position, the dissent stated that, if a state aims to protect or regulate the insurer/insured relationship, it is regulating the business of insurance, citing *Securities and Exchange Commission v. National Securities, Inc.*, 393 U.S. at 460, 89 S.Ct. at 568, 21 L.Ed.2d 668. Because the Kentucky state statute sought to regulate the relationship between insurer and insured at its most basic level, namely to limit the involvement of banks in insurance-related activities to prevent the coercion of bank customers into purchasing insurance to obtain loans,

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[13] In support of this position, Judge Batchelder cited *Colonial Life and Accident Insurance Company v. American Family Life Assurance Company*, 846 F.Supp. 454, 459 (D.S.C.1994).

the dissent set forth that the Kentucky state legislature enacted the statute out of direct concern for future policy holders. As such, the dissent reasoned that the Kentucky state statute was aimed at the protection of the insurance relationship between insurers and policy holders and regulated the business of insurance.

Moreover, the dissent examined whether Section 92 specifically related to the business of insurance, noting that the United States Supreme Court in *Fabe* determined that McCarran-Ferguson calls for a "clear statement rule," which means that to be specifically related to the business of insurance, Section 92 must clearly state that it regulates the business of insurance or otherwise intends to preempt a contrary state law. In refusing to find that Section 92 specifically related to the business of insurance, the dissent noted that the context of Section 92 has always been within the regulation of banking rather than insurance and that no party had cited any case in support of the contention that Section 92 specifically related to the business of insurance.

Accordingly, the dissent determined that McCarran-Ferguson prevented federal preemption of the Kentucky state statute.

2. Barnett Bank of Marion County, N.A. v. Gallagher.

More recently, the United States Court of Appeal for the Eleventh Circuit in *Barnett Bank of Marion County, N.A. v. Gallagher*, 43 F.3d 631 (11th Cir. (Fla.), decided 1/30/95, addressed the issue of whether a Florida state statute, which provided that no insurance agent licensed by the Department of Insurance who is associated with . . . a financial institution shall engage in insurance agency activities as an employee, officer, director, agent, or associate of a financial institution agency, must yield to Section 92. In applying the criteria set forth in

Fabe, the U.S. appellate court for the Eleventh Circuit examined whether the Florida state law was aimed at the regulation of an essential part of the business of insurance. The court determined that, because of the possible pressure which could be applied on policy holders facilitating improper insurance decisions, the Florida state statute protects policy holders. As such, the Florida state statute regulates the business of insurance under the terms of McCarran-Ferguson, and the federal law must yield to the extent that the state law furthers the interest of policy holders.

The Eleventh Circuit Court of Appeal further opined that state laws enacted for the purpose of regulating the business of insurance do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise. In determining whether Section 92 requires otherwise, the court noted that the legislative history of Section 92 revealed that, prior to 1944, Congress and the United States Supreme Court understood *Paul v. Commonwealth of Virginia*, 75 U.S. at 183, 19 L.Ed 357, 8 Wall. 168, to place insurance outside the Commerce Clause. The court reasoned that, at the time Congress enacted Section 92 and for thirty years thereafter, Congress believed it did not have the power to regulate insurance. As such, Congress could not have intended to regulate the business of insurance when it did not believe that it had the power to do so. Hence, in enacting Section 92, Congress was concerned with banking and not insurance. The court then concluded that, since Section 92 neither relates to the business of insurance nor specifically requires that the apparently conflicting state law be preempted, under McCarran-Ferguson, the Florida state statute was not preempted by federal law.

For the reasons set forth previously, we believe the opinion in *Barnett Bank* by the Eleventh Circuit Court of Appeal and the dissenting opinion in *Owensboro* by the Sixth Circuit Court of Appeal are the better reasoned

and are more persuasive than the majority opinion in *Owensboro*.

BANK HOLDING COMPANY AND SUBSIDIARY

Pursuant to the stipulation of the parties, First National is a wholly-owned subsidiary of Bancshares, a bank holding company, and First Advantage is a wholly-owned subsidiary of First National Bank. LSA-R.S. 6.121B(2) clearly prohibits any bank, bank holding company, or subsidiary thereof to engage in any insurance activity except as expressly authorized in LSA-R.S. 6.242A(6). Moreover, LSA-R.S. 6:513 prohibits a bank holding company or any subsidiary thereof to engage in any insurance activity, except for those activities in which a bank can engage. Because we have determined that First National cannot engage in any insurance activity, except as authorized in LSA-R.S. 6:242A(6), it follows then that First Advantage, its wholly-owned subsidiary, and Bancshares, a bank holding company, cannot engage in any insurance activity except as authorized in LSA-R.S. 6:242A(6). Pursuant to LSA-R.S. 242A(6), the only insurance activity in which a bank and, therefore, a bank subsidiary or a bank holding company may engage in is the sale of credit life insurance and credit health and accident insurance to its customers.

DENIAL OF EQUAL PROTECTION

First National and First Advantage contend that the prohibition on bank sales of insurance violates the Equal Protection Clauses of both the federal and state constitutions because savings and loans are permitted to sell insurance in Louisiana. However, First National and First Advantage failed to demonstrate that state and national banks are treated differently. The Louisiana statutory scheme clearly prohibits all banks, both national and state, from engaging in any insurance activity, except for

the sale of credit life insurance and credit health and accident insurance to its customers. Moreover, First National and First Advantage failed to demonstrate that the Louisiana statutory scheme with regard to the differential treatment of banks and savings and loans with respect to the sale of insurance is unconstitutional.

CONCLUSION

The issues raised in this appeal are the most recent conflicts in the long running turf battle on the part of two powerful industries, namely banking and insurance, each of which is subject to governmental regulation. The jurisprudence reveals that these battles are occurring in states around the country, and different courts are arriving at different results. Ultimately, the various questions raised will have to be answered by the United States Supreme Court. We strongly feel that we have reached the better reasoned conclusion to the very complicated issues involved in this litigation.

For the above reasons, the judgment of the trial court affirming the revocation of First Advantage's general insurance agent license and limiting such insurance agent license to the sale of credit life and credit health and accident insurance to its customers is affirmed. To the extent that the judgment of the trial court is in conflict with this opinion, it is hereby amended. First Advantage and First National are cast for all costs on appeal.

AFFIRMED, AS AMENDED.

APPENDIX L

THE SUPRÉME COURT OF THE
STATE OF LOUISIANA

No. 95-C-0820

FIRST ADVANTAGE INSURANCE, INC. AND
FIRST NATIONAL BANK OF DENHAM SPRINGS

VS.

THE HONORABLE DOUGLAS GREEN,
COMMISSIONER OF INSURANCE, STATE OF LOUISIANA

IN RE: First Advantage Ins.; First National Bk.Den. Spgs;—Plaintiff(s); Applying for Writ of Certiorari and/or Review; Parish of East Baton Rouge 19th Judicial District Div. "K" Number 365,352; to the Court of Appeal, First Circuit, Number 94CA 0813

May 5, 1995

Denied.

JPV

WFM

JCW

HTL

CDK

CALOGERO, C.J. not on panel.

DENNIS, J. would grant the writ.

JOHNSON, J. would grant the writ.

Supreme Court of Louisiana
May 5, 1995

/s/ [Illegible]
Clerk of Court
For the Court

Supreme Court, U. S.
F I L E D
SEP 13 1995
CLERK

No. 95-74

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

DON W. STEPHENS, Commissioner, Department of Insurance, Commonwealth of Kentucky, et al., *Petitioners,*

v.

THE OWENSBORO NATIONAL BANK, et al., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENTS, THE OWENSBORO NATIONAL BANK, THE FIRST NATIONAL BANK OF LOUISA, CITIZENS NATIONAL BANK OF PAINTSVILLE, AND KENTUCKY BANKERS ASSOCIATION, IN RESPONSE TO THE PETITION

Of Counsel:

M. BROOKS SENN
Vice President & General Counsel
Kentucky Bankers Association
Waterfront Plaza, Suite 1000
325 West Main Street
Louisville, KY 40202
(502) 582-2453

M. THURMAN SENN
Counsel of Record
MORGAN & POTTINGER, P.S.C.
601 West Main Street
Louisville, KY 40202
(502) 589-2780
Counsel for Respondents, The Owensboro National Bank, Citizens National Bank of Paintsville, The First National Bank of Louisa, and Kentucky Bankers Association

September 13, 1995

WESTERFIELD-BONTE CO., 619 W. KENTUCKY–P.O. BOX 3251, LOUISVILLE, KY.

35 pp

QUESTIONS PRESENTED

Whether the United States Court of Appeals for the Sixth Circuit correctly decided that, under a traditional preemption analysis, the Commonwealth of Kentucky could not enact a statute which would prohibit national banks in small towns from exercising their express power under 12 U.S.C. §92 (1994) to "act as the agent for any fire, life or other insurance company"?

Whether the United States Court of Appeals for the Sixth Circuit correctly decided that a state statute which prohibits a national bank from exercising one of its express statutory powers is not a law "enacted by any State for the purpose of regulating the business of insurance" within the meaning of §2(b) of the McCarran-Ferguson Act, 15 U.S.C. §1012(b) (1994)?

Whether 12 U.S.C. §92, which expressly authorizes a national bank in a small town to "act as the agent for any fire, life or other insurance company" and which specifically contains the word "insurance" five times, is a statute which "specifically relates to the business of insurance" within the meaning of §2(b) of the McCarran-Ferguson Act, 15 U.S.C. §1012(b)?*

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*Pursuant to Supreme Court Rule 29.1, Respondents state that (a) The Owensboro National Bank is a wholly-owned subsidiary of Area Bancshares Corporation, (b) Citizens National Bank of Paintsville is a wholly-owned subsidiary of Citizens National Corporation, and (c) The First National Bank of Louisa is a wholly-owned subsidiary of Community Holding Company. Kentucky Bankers Association does not have a parent company.

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No. 95-74

IN THE

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October Term, 1995

DON W. STEPHENS, Commissioner, Department of Insurance, Commonwealth of Kentucky, et al., *Petitioners,*

v.

THE OWENSBORO NATIONAL BANK, et al., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF RESPONDENTS, THE OWENSBORO NATIONAL BANK, THE FIRST NATIONAL BANK OF LOUISA, CITIZENS NATIONAL BANK OF PAINTSVILLE, AND KENTUCKY BANKERS ASSOCIATION, IN RESPONSE TO THE PETITION

Respondents, The Owensboro National Bank, The First National Bank of Louisa, Citizens National Bank of Paintsville, and the Kentucky Bankers Association (collectively referred to as the "National Banks") submit this brief in response to the petition for a writ of certiorari filed by Petitioners.

STATEMENT OF THE CASE

This petition is one of three petitions for a writ of certiorari currently pending before the Court concerning the identical issue — does §2(b) of the McCarran-Ferguson Act (15 U.S.C. §1012(b) (1994)) authorize the states to prohibit national banks located in small towns from exercising their express statutory power under 12 U.S.C. §92 (1994) to act as insurance agents?

The second petition seeks review of the decision of the United States Court of Appeals for the Eleventh Circuit in *Barnett Bank of Marion County, N.A.* v. *Gallagher*, 43 F.3d 631 (11th Cir. 1995), *cert. petition filed* No. 94-1837 (May 8, 1995).

The third petition seeks review of the decision of the Louisiana Court of Appeals, First Circuit, in *First Advantage Ins., Inc.* v. *Green*, 652 So.2d 562 (La.Ct.App., First Cir. 1995), *cert. denied*, No. 95-C-0820 (La.Sup.Ct. May 5, 1995), *cert. petition filed* No. 94-2130 (June 27, 1995).

In this case, the Sixth Circuit concluded that §2(b) of McCarran-Ferguson did not protect a Kentucky banking statute from preemption. Both the Eleventh Circuit and the Louisiana Court of Appeals decided that §2(b) of the McCarran-Ferguson Act preserved the state statutes in question from preemption and prevents national banks in Florida and Louisiana from exercising their powers under 12 U.S.C. §92.[1]

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[1]Technically, the Louisiana Commissioner of Insurance sought to revoke the insurance agent license of First Advantage Insurance, Inc., a wholly-owned subsidiary of First National Bank of Denham Springs. However, it is undisputed that a national bank may exercise its powers through the vehicle of wholly-owned subsidiaries. *See* 12 C.F.R. §5.34(c); *Independent Ins. Agents of America, Inc.* v. *Ludwig*, 997 F.2d 958 (D.C. Cir. 1993).

While the National Banks believe that the result reached by the Sixth Circuit is correct, the controversy created by these conflicting decisions merits review by this Court. Thus, for the reasons set forth below, the National Banks urge this Court to grant the petitions in all three cases on the McCarran-Ferguson issue, consolidate the cases for review, and finally resolve this important issue.

A. Historical Perspective.

1. CONGRESS' LONG ESTABLISHED PLENARY POWER TO CONTROL NATIONAL BANK POWERS.

Petitioners in this case (collectively the "Insurance Industry")[2] would have this Court believe that the history of the interrelationship of state and federal law relating to national banks began in 1869 when this Court in *Paul* v. *Virginia*, 75 U.S. (8 Wall.) 168 (1869), determined the business of insurance was not at that time to be treated as interstate commerce within the meaning of the Commerce Clause of the United States Constitution.

Rather, that history began fifty years earlier at the dawn of this country with the seminal decision of *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Chief Justice Marshall declared in that case that Congress' authority to establish a national bank was a necessary and proper incident to its constitutional powers to establish a currency, raise and support armies, and in general carry on the fiscal operations of a national government. *Id.* at 399-423.

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[2]Petitioners are Don W. Stephens, the current Commissioner of the Kentucky Department of Insurance, the Kentucky State Association of Life Underwriters, the Independent Insurance Agents of Kentucky, Inc., and the Kentucky Association of Professional Insurance Agents. Commissioner Stephens has been substituted for former Commissioner Elizabeth Wright who was originally named, in her official capacity, as a Defendant in the complaint filed by the National Banks. The District Court permitted the insurance agent trade associations to intervene in opposition to the National Banks.

This Court in *McCulloch* v. *Maryland* further declared unconstitutional, under the Supremacy Clause of the United States Constitution (Art. VI, Clause 2), a Maryland statute that taxed the branches of the Bank of the United States even though there was no federal statute expressly precluding such a state tax. *Id.* at 423-438.

When Congress chose to enact the National Bank Act of 1864 (Act of June 3, 1864, 13 Stat. 99 (1864)) and establish the current national bank system, this Court in *Farmers' and Mechanics' Nat'l Bank* v. *Dearing*, 91 U.S. 29 (1875), described the basis for that law and the limits on state regulation of national banks in the same constitutional language:

> The constitutionality of the act of 1864 is not questioned. It rests on the same principle as the act creating the second bank of the United States. The reasoning of Secretary Hamilton and of this court in *McCulloch* v. *Maryland* (4 Wheat. 316) and in *Osborne* v. *The Bank of the United States* (9 id. 708), therefore, applies. The national banks organized under the act are instruments designed to be used to aid the government in the administration of an important branch of the public service. . . . Being such means, . . . the States can exercise no control over them, nor in any wise affect their operation, except in so far as Congress may see proper to permit. . . . Against the national will the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control . . . .

Id. at 33-34.

In the *Farmers' and Mechanics' Nat'l Bank* decision, the Court held that a provision of the National Bank Act requiring forfeiture of only interest in an usurious loan transaction preempted a New York law requiring forfeiture of both principal and interest.

In the following years, this Court has repeatedly declared invalid state laws which conflicted with Congressional regulation of national banks. *See Franklin Nat'l*

Bank v. *New York*, 347 U.S. 373 (1954) (national bank's powers under 12 U.S.C. §24 (Seventh) to "receive deposits" and exercise "all such incidental powers as shall be necessary to carry on the business of banking" preempted a New York law prohibiting use of the words "saving" or "savings" in a national bank's advertisements); *Easton* v. *Iowa*, 188 U.S. 220 (1903) (an Iowa statute making it a crime for an officer of any bank in Iowa, including national banks, to receive deposits at a time when the bank was insolvent was preempted because the National Bank Act only prohibited a national bank from receiving deposits after the Comptroller took control of the bank); *Davis* v. *Elmira Savings Bank*, 161 U.S. 275 (1896) (§5236 of the Revised Statutes, requiring that the assets of an insolvent national bank be distributed ratably among its creditors, preempted a New York state law requiring that assets of any insolvent bank in New York be first applied to repay the depositors).

Indeed, the chronicle of federal preemption in the national bank context includes a chapter concerning Respondent, The Owensboro National Bank ("ONB"). Almost 100 years ago, ONB requested this Court to reverse a decision by Kentucky's highest court holding that Kentucky had the power to tax it. The basis for that appeal was that Congress had specified how national banks could be taxed and thereby preempted conflicting Kentucky law. This Court, in an unanimous opinion, reversed the Kentucky court's decision and precluded Kentucky from taxing ONB contrary to Congress' plan. *Owensboro Nat'l Bank* v. *Owensboro*, 173 U.S. 664 (1899).

Congress has occasionally acted to preserve state authority over national banks. For example, §30 of National Bank Act of 1864 expressly provided that the interest rate national banks generally could charge was "at the rate allowed by the laws of the state or territory where the bank is located, and no more". *See* Act of June 3, 1864, ch. 106, §30, 13 Stat. 99, 108 (1864).

Another example occurred in 1913 when Congress amended §44 of the National Bank Act (then codified at R.S. §5414) relating to the conversion of state banks to national banks by adding a new proviso that such a conversion "shall not be in contravention of the State law." *See* Act of December 23, 1913, ch. 6, §8, 38 Stat. 251, 258 (1913).

Yet another example occurred in 1940 when Congress amended 12 U.S.C. §24 by adding a paragraph authorizing national banks to make charitable contributions if the national bank "is located in a State the laws of which do not expressly prohibit State banking institutions from contributing to such funds". *See* Act of June 11, 1940, ch. 301, 54 Stat. 261 (1940).

But in each case, state authority over national banks was preserved only by an express statutory reservation. This is not the case with respect to 12 U.S.C. §92.

2. THE ACT OF SEPTEMBER 7, 1916 (12 U.S.C. §92).

With its paramount authority over national banks thus long established, Congress in 1916 decided that national banks in small communities should have the power to act as insurance agents.

At the suggestion of the Comptroller of the Currency, Congress enacted 12 U.S.C. §92 to strengthen national banks in small towns by providing them with an additional source of revenue.[3] Then Comptroller J. Skelton

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[3]*See Act of September 7, 1916*, Pub. L. No. 64-270, 39 Stat. 752, 753-754. This statute was codified in first edition of the United States Code in 1926 at 12 U.S.C. §92, but was "omitted" from the 1952 and subsequent editions of the United States Code based upon the codifier's opinion that the punctuation of a 1918 statute caused the provision to be accidentally repealed. However, because this Court recently held that the statute has always been in effect, the statute has now been again included in the United States Code at 12 U.S.C. §92 (1994). *See United States National Bank of Oregon* v. *Independent Insurance Agents of America, Inc.*, 508 U.S. ___, 113 S.Ct. 2173 (1993).

Williams' letter to Senator Robert L. Owen is the only contemporaneous legislative history concerning §92 and a copy is reproduced in Appendix A to this Brief.[4]

Section 92 expressly provides:

> In addition to the powers now vested by law in national banking associations . . . any such association located and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, may, under such rules and regulations as may be prescribed by the Comptroller of Currency, act as the agent for any fire, life or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company; . . . .

Section 92 did not then, and does not now, contain any language providing that a national bank's exercise of its insurance agent powers is generally conditioned upon state law. Rather, the statute expressly provides that the national bank agency powers may be exercised "under such rules and regulations as may be prescribed by the Comptroller of the Currency". The only reference to state law is the requirement that the "insurance company" (not the insurance agent) be "authorized by the authorities of the State in which said bank is located to do business in said State . . . ." Congress did not elect to otherwise condition exercise of §92 power on compliance with state law.

When §92 was enacted, there was no outcry that the legislation exceeded Congress' powers. There was no com-

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[4]Comptroller Williams' letter was published in the Congressional Record and this is the source for the copy reproduced in the National Banks' Appendix A. See 53 Cong. Rec. S11001 (1916).

plaint that Congress was acting in a sphere that was the exclusive province of the states. There was no suggestion that a national bank's authority to act as an insurance agent should be contingent upon state law even though Congress had previously expressly placed such conditions on other national bank powers. In sum, §92 was recognized for what it was — the exercise of Congress' plenary power to structure the operations of national banks as it saw fit.

3. §2(B) OF THE MCCARRAN-FERGUSON ACT OF 1945.

Thus, it is surprising that the federal legislation relied upon by the Insurance Industry was not enacted for another 29 years. In 1945, Congress enacted the McCarran-Ferguson Act (15 U.S.C. §1011 *et seq.*) (1994) in response to this Court's decision in *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944).[5] In *South-Eastern Underwriters*, this Court held that the insurance industry was subject to regulation by Congress under the Commerce Clause, and therefore insurance company activities were subject to federal antitrust laws.

The McCarran-Ferguson Act "operates to assure that the States are free to regulate insurance companies without fear of Commerce Clause attack." *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205, 218 n. 18 (1979). "Congress was mainly concerned with the relationship between insurance ratemaking and the antitrust laws, and with the power of the States to tax insurance companies." *Securities Exchange Comm'n* v. *National Securities, Inc.*, 393 U.S. 453, 459 (1968).

The "Declaration of Policy" provision of McCarran-Ferguson stresses that,

> Congress declares that the *continued* regulation and taxation by the several states of the business of insur-

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[5] *Act of March 9, 1945*, ch. 20, 59 Stat. 33 (1945).

> ance is in the public interest, and that the *silence on the part of the Congress* shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

15 U.S.C. §1011 (1994) (emphasis added).

Of course, in 1945, Congress could not have been preserving a "continued regulation" by the several States of the express powers of national banks since this Court had long before ruled that the states did not possess the power to override national banking powers. Nor had Congress been silent on the issue of small town national bank insurance agent powers since in 1916 Congress had expressly granted that power by enacting §92. Indeed, the Insurance Industry has not identified a single piece of legislative history demonstrating that Congress understood McCarran-Ferguson to be creating any new type of limitation on its previous plenary power over national banks.

Nevertheless, the Insurance Industry now relies upon Section 2(b) of the McCarran-Ferguson Act (15 U.S.C. §1012(b)) which provides, in relevant part:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, . . ., unless such Act specifically relates to the business of insurance . . . .

This statute establishes a rule of statutory construction which precludes a court from construing a federal law to "supersede" a state law — but only if two separate requirements (or "prongs") are met:

1. The state law was "enacted . . . for the purpose of regulating the business of insurance"; and
2. The federal law does not "specifically relat[e] to the business of insurance".

Federal law, and not state law, governs the meaning these terms. *Securities Exchange Comm'n* v. *Variable Annuity Life Ins. Co.*, 359 U.S. 65, 69 (1959).

This Court has only addressed the meaning of this specific provision three times. In two cases, the Court has addressed the first prong of §2(b). *See Securities Exchange Comm'n* v. *National Securities, Inc.*, 393 U.S. 453 (1968); *United States Dept. of Treasury* v. *Fabe*, ___ U.S. ___, 113 S.Ct. 2202, 2208 (1993). In one case, the Court has addressed the second prong. *See John Hancock Mutual Life Ins. Co.* v. *Harris Trust And Savings Bank*, ___ U.S. ___, 114 S.Ct. 514 (1993).

4. KY. REV. STAT. §287.030(4).

The Insurance Industry argues that a Kentucky statute — Ky.Rev.Stat. §287.030(4) (Baldwin 1994) — prohibits any national bank in Kentucky which is owned by a holding company from acting as an insurance agent for any type of insurance except certain credit-related insurance. They further argue that §2(b) of McCarran-Ferguson insulates this statute from preemption by §92.

Ky.Rev.Stat. §287.030(4) is contained in Chapter 287 of the Kentucy Revised Statutes which is entitled "Banks And Trust Companies".[6] The statute currently states:

> No person who after July 13, 1984, owns or acquires more than one-half (1/2) of the capital stock of a bank shall act as insurance agent or broker with respect to any insurance except credit life insurance, credit health insurance, insurance of the interest of a real property mortgage in the mortgaged property, other than title insurance.

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[6]Kentucky's Insurance Code is codified at Chapter 304 of the Kentucky Revised Statutes.

This statutory prohibition did not exist prior to 1972. Prior to 1972, Ky.Rev.Stat. §287.030(3) (where the statute was codified at that time) only prohibited a person from owning more than one-half of the capital stock of a bank. In effect, Kentucky prohibited bank holding companies, and the prohibition was enacted "as a means of preventing the concentration of financial power in one person or company." *See* Ky. OAG 70-643 at p.4 (*reprinted in* Pet. App. I at 60a-63a).[7] This purpose is entirely consistent with the language of the statute which would not, under any reading, prohibit a bank from acting as an insurance agent if no single person owns more than one-half of its capital stock.

In 1972, Kentucky amended Ky.Rev.Stat. §287.030(3) to authorize the formation of one-bank holding companies. *See* 1972 Ky. Acts Ch. 174, §1. It was at that time that the prohibition on non-credit insurance agent activities by a person who owns or acquires more than one-half of the capital stock of a bank was enacted. In 1981, the Kentucky Attorney General stated that "the clear intent of the legislature [was] to limit the involvement of majority bank shareholders, including one-bank holding companies, in insurance related activities." *See* Ky. OAG 81-173 at p.4.

In 1984, Kentucky amended its banking statutes to authorize the formation of multi-bank holding companies. At that time, the prohibition on insurance agent activity was amended to its current form (which involved no sub-

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[7]Prior to 1972, Ky.Rev.Stat. §287.030(3) stated:

> "No person shall, directly or indirectly, hold or own more than one half of the capital stock of a bank or combined bank and trust company, exclusive of stock held as collateral; but there is no limitation on the amount of capital stock that may be held by the United States or by a corporation in which the United States owns or holds the majority of the stock."

stantive change for purposes of this case) and moved from subsection (3) to its current codification in subsection (4). *See* 1984 Ky. Acts Ch. 130, §2.

B. Proceedings Below.

This dispute over the §92 began in late 1990 when the National Banks each attempted to exercise their powers under 12 U.S.C. §92.[8] Each, by counsel, submitted to the Kentucky Department of Insurance (the "Department") a request for applications to apply for licenses to act as "general lines" and "life" insurance agents. Relying upon Ky.Rev.Stat. §287.030(4), the Department refused to provide the National Banks with the requested applications.

The National Banks then filed this action on January 24, 1991, in the United States District Court for the Eastern District of Kentucky, Frankfort Division, against the Department and its Commissioner seeking a declaration of rights and injunctive relief. During the proceedings, the insurance trade associations intervened on behalf of the Department and its Commissioner. The United States of America intervened as a plaintiff in support of the National Banks.

The National Banks' Complaint alleged that Ky.Rev.Stat. §287.030(4), contrary to the historical position of the Department, does not prohibit banks from acting as agents for the sale of non-credit related insurance.

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[8]It is undisputed that Respondents, The Owensboro National Bank, The First National Bank of Louisa and Citizens National Bank of Paintsville are national banks located and doing business in a town in Kentucky with a population which does not exceed 5,000 inhabitants as shown by the 1990 Census. It is also undisputed that each is a wholly-owned subsidiary of a bank holding company. Respondent, Kentucky Bankers Association (the "KBA") is a trade association of banks in Kentucky, and each of the three respondent national banks is a member of the KBA.

The section only applies to a "person who . . . owns or acquires more than one-half (½) of the capital stock of a bank", *e.g.*, a bank holding company, not to the "bank" itself. Alternatively and assuming the Department's state law interpretation was correct, the National Banks alleged that §92 preempted Ky.Rev.Stat. §287.030(4).

On April 18, 1991, the National Banks filed a motion for summary judgment. For purposes of the motion, the National Banks assumed that the Department's position that Ky.Rev.Stat. §287.030(4) applies to bank subsidiaries was correct.[9] Thus, the issue presented by that motion was whether or not §92 preempted Ky.Rev.Stat. §287.030(4).

In response, the Insurance Industry conducted discovery and then it filed a cross-motion for summary judgment which relied exclusively on Ky.Rev.Stat. §287.030(4) as the sole state law precluding licensing of the National Banks. The Insurance Industry argued that, under traditional preemption analysis, §92 should not be interpreted to preempt Ky.Rev.Stat. §287.030(4). The Insurance Industry also argued that §2(b) of the McCarran-Ferguson Act insulated Ky.Rev. Stat. §287.030(4) from preemption.[10]

On August 4, 1992, the District Court granted summary judgment in favor of the National Banks. Applying a

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[9]The National Banks specifically advised the District Court that "in the event this Court rejects the National Banks' preemption argument, the National Banks reserve the right to litigate, by further proceedings in this court or otherwise, the precise scope of KRS 287.030(4)." *See* Plaintiffs' Memorandum In Support Of Their Motion For Summary Judgment at p.11, n.6. The National Banks have continued to reserve this right and do so here as well.

[10]The Insurance Industry also raised other arguments before the District Court. However, all of those argument were rejected, and the Insurance Industry has not asked this Court to review those decisions.

standard preemption analysis, the District Court stated that it "has no difficulty concluding that §92 preempts Ky.Rev.Stat. §287.030(4)", and the National Banks "may not be prevented from applying for insurance licenses." *Owensboro Nat'l Bank* v. *Moore*, 803 F. Supp. 24, 33-35 (E.D. Ky. 1992) (Pet. App. B at 41a-45a).

The District Court then concluded that neither §287.030(4) nor §92 involves regulation of the "business of insurance" within the meaning of either the first or second prong of §2(b) of McCarran-Ferguson. With respect to §92, the District Court observed that the "function" of §92 is "to grant additional powers to national banks" and concluded that merely because the power "involves insurance does not transform this section into a regulation of the business of insurance." *Id.*, 803 F. Supp. at 36 (Pet. App. B at 46a).

With respect to Ky.Rev.Stat. §287.030(4), the District Court "reache[d] the inescapable conclusion" that the statute "does not regulate the business of insurance" within the meaning of §2(b) of McCarran-Ferguson. The Court observed that the statute "regulates bank holding companies", does not appear in the chapter of the Kentucky Revised Statutes regulating insurance, and does not "relat[e] . . . to the powers of insurance companies or agents". *Id.*

The District Court then examined how the three factors identified by this Court in *Union Labor Life Ins. Co.* v. *Pireno*, 458 U.S. 119 (1982), for determining what is the "business of insurance" applied to the statute.[11] The Dis-

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[11]The three factors identified in *Pireno* are:

> "[F]irst, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry."

Pireno, 458 U.S. at 129.

trict Court concluded that none of the three factors were applicable. Finally, the District Court cited the Third Circuit's decision in *United Services Auto Ass'n* v. *Muir*, 792 F.2d 356, 364 (3rd Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987), in which that court held that a Pennsylvania statute prohibiting the affiliation of insurance companies and lending institutions was designed to prevent competition and had "no part in the business of insurance under McCarran-Ferguson." *Id.*

The Insurance Industry appealed to the United States Court of Appeals for the Sixth Circuit. On December 29, 1994, the Sixth Circuit affirmed the District Court's judgment in a 2-1 decision. *Owensboro Nat'l Bank* v. *Stephens*, 44 F.3d 388 (6th Cir. 1994) (Pet. App. A at 1a-25a). All three judges agreed that §92 preempts §287.030(4) under traditional preemption analysis. *Id.* at 390-391, 393. However, the judges disagreed as to the proper application of §2(b) of McCarran-Ferguson in light of this Court's decision in *United States Department of Treasury* v. *Fabe*, ___ U.S. ___, 113 S.Ct. 2202 (1993), which was decided after the District Court's decision.

In analyzing the first prong of McCarran-Ferguson §2(b), the majority in *Owensboro* quoted the general test established by *Fabe* that "[t]he broad category of laws enacted 'for the purpose of regulating the business of insurance' consists of laws that possess the 'end, intention, or aim' of adjusting, managing, or controlling the business of insurance". *Owensboro*, 44 F.3d at 392 (Pet. App. A at 9a). The majority then stated that "[i]f . . . the issue arises of whether a particular activity is part of the 'business of insurance,' the *Pireno* criteria apply." *Id.*

As a result, the panel's majority reached the quite unremarkable conclusion that "to have been 'enacted . . . for the purpose of regulating the business of insurance,' [Kentucky's] section 287 must possess the aim of regulat-

ing activities that meet the *Pireno* criteria" for what is "the business of insurance". *Id.* The panel majority explained that it did not believe Ky.Rev.Stat. §287.030(4) met this test:

> Excluding a person from participation in an activity, however, is different from regulating the manner in which that activity is conducted. The former is regulation of the person; the latter is the regulation of the activity. Section 287 . . . in no way governs the manner in which the activities constituting the 'business of insurance' are conducted. Section 287 thus is different in kind from the Ohio statute that was found to regulate the business of insurance in *Fabe*, since the Ohio statute set standards for 'the actual performance of an insurance contract.' ___ U.S. at ___, 113 S.Ct. at 2210. . . . [W]e conclude that section 287 was enacted for the purpose of regulating certain conduct by bank holding companies, not the business of insurance . . . .

Owensboro, 44 F.3d at 392 (Pet. App. A at 9a).

In effect, the panel's majority concluded that in entirely prohibiting national banks from becoming agents of insurance companies, Ky.Rev.Stat. §287.030(4) does not "regulate" the "relationship between the insurance company and the policyholder" and its "indirect effects", if any, on policyholders are "too tenuous" under *Fabe* to fall within the first prong of §2(b). *See Fabe*, 113 S.Ct. at 2212.

Since this disposed of the Insurance Industry's McCarran-Ferguson argument, the majority did not reach the issue of whether or not §92 "specifically relates to the business of insurance" within the meaning of the second prong of McCarran-Ferguson.

Judge Batchelder dissented on the issue of how to apply §2(b) of McCarran-Ferguson. She concluded that both prongs of McCarran-Ferguson were satisfied, thereby saving Ky.Rev.Stat. §287.030(4) from preemption.

With respect to the first prong of §2(b), Judge Batchelder believed that Kentucky "enacted [its] statute out of a direct concern for future policyholders." *Id.* at 397. Relying heavily on the view of the Florida District Court in *Barnett Bank* of the purpose of Florida's statute,[12] she believed that Ky.Rev.Stat. §287.030(4) was intended to keep banks from being licensed because "consumer[s] could feel coerced into purchasing insurance from the bank". She also believed that the statute was designed to "ensur[e] that insurance companies remain solvent." *Id.*

Thus, Judge Batchelder concluded that the statute met the requirement in *Fabe* that it be enacted to protect or regulate the relationship between the insurer and the policyholder. Judge Batchelder further believed that Kentucky's prohibiting a class of persons from acting as non-credit insurance agents was a sufficient "regulation" of the "business of insurance" as to fall within the first prong of McCarran §2(b).

Judge Batchelder then turned to the second prong of §2(b) and concluded that 12 U.S.C. §92 does not "specifically relate" to the business of insurance. Judge Batchelder did not consider this Court's recent decision in *John Hancock Mutual Life Ins. Co.* v. *Harris Trust And Savings Bank*, ___ U.S. ___, 114 S.Ct. 514, 525 (1993), which concluded that "ERISA, both in general and in the guaranteed benefit policy provision in particular, obviously and spe-

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[12]Florida's statute, which is contained in Florida's Insurance Code, prohibits all insurance agents from engaging in insurance agency activities "as a employee, officer, director, agent, or associate of a financial institution agency." A bank is a "financial institution" unless the bank is not a subsidiary or affiliate of a bank holding company and is located in a city with a population of less than 5,000. *See* Fla.Stat.Ann. §626.988 (West Supp. 1995).

cifically relates to the business of insurance." Rather, she believed that the decision in *Fabe* established a "clear statement rule" under which a federal statute "must 'clearly state' that it regulates the business of insurance or otherwise intends to preempt a contrary state law." *Owensboro* 44 F.3d at 398 (Pet. App. A at 22a). Judge Batchelder believed that §92 did not meet this test because the "context of §92 has always been within the regulation of banking rather than insurance." *Id.*

After the Sixth Circuit denied the Insurance Industry's petitions for rehearing and rehearing en banc, the Insurance Industry filed their petition for writ of certiorari.

THE WRIT SHOULD NOT BE HELD IN ABEYANCE. IT SHOULD BE GRANTED BUT ONLY ON THE McCARRAN-FERGUSON ACT ISSUE.

The Insurance Industry seeks to argue two principal issues before this Court. One issue is a standard federal preemption question. The second issue involves the proper application of the first and second prongs of §2(b) of the McCarran-Ferguson Act.

However, the Insurance Industry does not wish this case to be the vehicle for deciding those issues. Instead, they urge that "the Court hold this petition pending review of the judgment entered by the United States Court of Appeals for the Eleventh Circuit in *Barnett Bank of Marion County, N.A.*, 43 F.3d 631 (11th Cir. 1995), *cert. petition filed* No. 94-1837 (May 8, 1995), and then grant the petition, vacate the Sixth Circuit's decision, and remand for reconsideration in light of this Court's decision in *Barnett.*" (Petition at 2).

The Insurance Industry is represented by the same law firm that represents the insurance agent trade associa-

tions in the *Barnett Bank* case.[13] Therefore, it is no surprise that the Insurance Industry would be willing to have the National Banks' rights in this case turn on a decision in *Barnett Bank*.

The National Banks do not believe that the Insurance Industry should be permitted to have their counsel litigate their dispute with the National Banks using the vehicle of another case in which the National Banks have no voice. If the National Banks' rights are to be affected by a decision from this Court argued by their opponents' counsel, then fundamental fairness requires that the National Banks be given the equivalent opportunity to participate as parties before this Court.

Since the National Banks agree that the McCarran-Ferguson issue is one which deserves review by this Court, the National Banks submit that the only proper course is to grant the petition in this case and consolidate the case with *Barnett Bank* and *First Advantage*.

In granting the petition, however, the Court should limit review to the McCarran-Ferguson issue and should not review the decision that §92 preempts Ky.Rev.Stat. §287.030(4) under traditional preemption analysis.

I. THE SIXTH CIRCUIT CORRECTLY APPLIED TRADITIONAL FEDERAL PREEMPTION ANALYSIS ABOUT WHICH THERE IS NO CONFLICT.

None of the judges below had any trouble "conclud[ing] that, under conventional preemption analysis, §92 preempts

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[13]Ann M. Kappler of Jenner & Block, Washington, D.C., is counsel of record for all of the Petitioners in this case as well as for the Respondents, Florida Association of Life Underwriters, Professional Insurance Agents of Florida, Inc. and Florida Association of Insurance Agents, in *Barnett Bank*. She is also counsel of record for the Louisiana insurance trade associations in *First Advantage*.

section 287." *Owensboro*, 44 F.3d at 391 (Pet. App. A at 7a). Even dissenting Court of Appeals Judge Batchelder agreed with this conclusion. *Id.* at 393 (Pet. App. A at 11a).

The conflict that the Sixth Circuit resolved in favor of federal law was succinctly summarized in the majority opinion — "while §92 provides that national banks such as plaintiff 'may' act as insurance agents, section 287 provides that they 'may not.' " *See Owensboro*, 44 F.3d at 390-391 (Pet. App. A at 5a). *Accord Hillsborough County, Florida* v. *Automated Medical Labs., Inc.*, 471 U.S. 707, 713 (1985) (preemption occurs "when compliance with both federal and state regulations is a physical impossibility").

The Insurance Industry does not argue that this conclusion was in conflict with the holding of another federal Court of Appeals or a state court of last resort. Nor did the Sixth Circuit's reasoned analysis of the Insurance Industry's arguments conflict with the applicable decisions of this Court. Rather, the Sixth Circuit correctly cited and applied the decisions in *Franklin National Bank* v. *New York*, 347 U.S. 373 (1954), and *Fidelity Federal Savings and Loan Assn.* v. *de la Cuesta*, 458 U.S. 141 (1982), where this Court similarly struck down state attempts to limit optional powers of federally chartered financial institutions.

The Insurance Industry's entire argument as to why this conclusion should be revisited by this Court is set forth in a single footnote in which the Insurance Industry argues that "[b]ecause the two provisions may be harmonized, however, the Sixth Circuit's conclusion is erroneous." (Petition at 14, n.10). However, both the lower courts expressly addressed this argument and easily rejected it. There is no reason to revisit this conclusion.

II. THE McCARRAN-FERGUSON ACT ISSUE IS AN IMPORTANT QUESTION DESERVING REVIEW BY THIS COURT.

The National Banks agree that there is a square conflict among the circuits and a state court of last resort as to the proper application of the §2(b) of the McCarran-Ferguson Act to national bank powers generally and §92 in particular. There is also much disagreement among those courts as to how to apply this Court's recent decisions in *Fabe* and *John Hancock* to this dispute.

These conflicts and disagreements have been exhaustively presented to this Court in the numerous writ petitions, responses and *amici* briefs previously filed in *Barnett Bank*[14] and *First Advantage*.[15] In all of the filings, the parties and *amici* have agreed that the issues are of great import. No party or amicus has suggested to this Court that review should not be had of these disputes.

Thus, the National Banks will not unduly burden this Court with a repetitive analysis of why review should be had on the important McCarran-Ferguson Act issue raised by this and the other two cases. Quite simply, there are

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[14]*Petition of Barnett Bank of Marion County, N.A.*, No. 94-2130 (May 8, 1995); *Response of Commissioner of Insurance, et al.*, No. 94-2130 (July 28, 1995); *Brief of the United States and Comptroller of the Currency As Amici Supporting Petitioner*, No. 94-2130 (July 7, 1995); *Brief of the Amici Curiae Consumer Bankers Association, et al.*, No. 94-2130 (July 7, 1995); *Brief of the New York Clearing House Association As Amicus Curiae*, No. 94-2130 (July 7, 1995); *Brief of the Amici Curiae American Bankers Association, et al.*, No. 94-2130 (July 7, 1995).

[15]*Petition of First Advantage Insurance, Inc. et al.*, No. 94-2130 (June 27, 1995); *Response of Commissioner of Insurance, et al.*, No. 94-2130 (July 28, 1995); *Brief of the Amici Curiae American Bankers Association, et al.*, No. 94-2130 (July 17, 1995).

"special and important reasons" for this Court to grant review. *See* Sup.Ct.Rule 10.1.

III. THIS CASE IS AN APPROPRIATE VEHICLE FOR PRESENTING THE McCARRAN-FERGUSON ACT DISPUTE.

In other situations, this Court has consolidated for review parallel petitions raising the same issue. *See Pauley* v. *Bethenergy Mines*, 501 U.S. 680 (1991) (consolidated review of conflicting decisions of the Third and Fourth Circuits on validity of Department of Labor regulations implementing the Black Lung Benefits Reform Act of 1977). Such consolidation is particularly appropriate here when the Petitioners in this case are represented by the same counsel who is counsel of record in *Barnett Bank*.

The Insurance Industry offers two reasons why such consolidation should not occur. (Petition at 17-19). Both reasons should be rejected.

First, the Insurance Industry argues that a proper record does not exist in this case regarding Kentucky's "purpose in enacting its licensing prohibition." The National Banks disagree since the record includes the 1970 Kentucky Attorney General's opinion which states that the purpose of Ky.Rev.Stat. §287.030(4) is to "prevent the concentration of financial power in one person or company." *See* OAG 70-643 (Pet. App. I at 63a).[16] Furthermore, the Insurance Industry conducted discovery before the District

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[16]The Insurance Industry also refers to a 1991 Resolution of one chamber of the Kentucky General Assembly which is dated 7 days after the National Banks filed their lawsuit. (Petition at 10, n.7). This resolution does not have the force of law nor even the weight of an attorney general's opinion. It is merely a *post hoc* opinion which is not entitled to any weight. *Russello* v. *United States*, 464 U.S. 16, 26 (1983) ("[I]t is well settled that the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.").

Court and filed their own motion for summary judgment. It is much too late for the Insurance Industry to argue that there is an inadequate record. In addition, the Florida and Kentucky statutes and their respective legislative histories may, in fact, aid this Court by providing two concrete statutory schemes against which the Court can apply an analysis of the first prong of McCarran-Ferguson §2(b).

Second, the Insurance Industry argues that the existence of a controversy over whether Ky.Rev.Stat. §287.030(4) applies to a national bank should preclude review. Neither the District Court nor the Court of Appeals found this to be an obstacle to review (particularly when the point was not raised by the Insurance Industry before the Court of Appeals). As the District Court succinctly explained, "it is sufficient for the purpose of this inquiry [federal preemption] that the Commissioner has applied it in such a manner" as to restrict the National Banks' activities. *Owensboro*, 803 F. Supp. at 34, n.7 (Pet. App. B at 41a).

Barnett Bank of Marion County suggests two additional reasons for reviewing the *Barnett Bank* decision in lieu of this case. *Petition of Barnett Bank of Marion County, N.A.*, No. 94-2130 (May 8, 1995) at 17. First, it argues that this case does not present a "concrete setting". That is not correct. The National Banks initially were expressly prohibited from obtaining insurance agent licenses and this has concretely restricted their activities. Moreover, in compliance with the District Court's judgment, a non-credit insurance agent license has been issued to Owensboro National Bank which the Department would presumably attempt to revoke if the Sixth Circuit's decision were reversed.

Second, the Florida bank relies upon the failure of the Sixth Circuit panel's majority to address the "specifically relates" prong of McCarran-Ferguson §2(b). The National Banks believe that this legal issue has been sufficiently framed by the opinions of District Judge Hood and Circuit

Judge Batchelder to justify reviewing this case along with the *Barnett Bank* decision.

Finally, this is the only case of the three in which the United States has participated as a party on behalf of the Comptroller of the Currency. Given the importance of the case for national bank powers nationwide, it is appropriate that this Court's review include the only case in which the United States and the Comptroller are parties.

CONCLUSION

For the foregoing reasons, the National Banks respectfully urge this Court to grant the petition for a writ of certiorari limited, however, to the proper interpretation and application of §2(b) of the McCarran-Ferguson Act.

Respectfully submitted,

M. THURMAN SENN
Counsel of Record
MORGAN & POTTINGER, P.S.C.
601 West Main Street
Louisville, KY 40202
(502) 589-2780
Counsel for Respondents, The Owensboro National Bank, Citizens National Bank of Paintsville, The First National Bank of Louisa, and Kentucky Bankers Association

Of Counsel:
M. BROOKS SENN
Vice President & General Counsel
Kentucky Bankers Association
Waterfront Plaza, Suite 1000
325 West Main Street
Louisville, KY 40202
(502) 582-2453

September 13, 1995

APPENDIX

APPENDIX A

TREASURY DEPARTMENT
COMPTROLLER OF THE CURRENCY
Washington, June 8, 1916.

MY DEAR SENATOR: The original national-bank act of February 25, 1863, as reenacted by the act of June 3, 1864, authorizing the formation of national banks throughout the country, provided that no national bank should be authorized with a capital of less than $50,000 in any place; that in a place with a population exceeding 6,000 the capital of the bank should not be less than $100,000, and further provided that no national bank with a capital of less than $200,000 should be organized in any place having a population of over 50,000.

Later on it became manifest that there were many country towns and villages which needed banking facilities but which did not have sufficient business to justify the organization of national banks with a capital of as much as $50,000. To extend the benefits of banking facilities to these small places the national-bank act was amended by the act of March 14, 1900, so as to authorize the organization in towns and villages with a population not exceeding 3,000 of banks with a minimum capital of $25,000.

Since this amendment to the bank act went into effect there have been organized throughout the country 3,084 national banks having a capital of $25,000. Four hundred and thirty-eight of these $25,000 banks have either failed or gone into liquidation, some have increased their capital, and the number of such banks with a capital of $25,000 now in operation is 2,079, or 27 per cent of the total number of national banks.

The average deposits (individual and bank) at this time of all $25,000 banks is $178,138, or 7.13 times their capital and 4.6 times their capital, surplus, and profits. A country bank with $25,000 capital and with the average deposits is able, with good management, to lend its money at rates authorized by law and at the same time to return a rea-

sonable dividend to its shareholders. But there are many banks located in country communities where the small deposits which the banks receive may make it somewhat difficult for the banks to charge on their loans only the rates of interest permitted by law and at the same time yield a satisfactory return to shareholders, and in many such cases banks have been tempted to exact excessive and in some cases grossly usurious rates on accommodations which they extend to local borrowers. It is unfortunately true that in many other cases banks have been demanding usurious rates of interest even though they had more than the average deposits and although adherence to the legal rates would still yield them liberal dividends on their shares.

For some time I have been giving careful consideration to the question as to how the powers of these small national banks might be enlarged so as to provide them with additional sources of revenue and place them in a position where they could better compete with local State banks and trust companies which are sometimes authorized under the law to do a class of business not strictly that of commercial banking.

Under section 5736, United States Revised Statutes, the business of national banks at this time is limited to the exercise of "such incidental powers as shall be necessary to carry on the business of banking by (a) discounting and negotiating promissory notes, drafts, bills of exchange or either evidences of debt: (b) receiving deposits; (c) buying and selling exchange, coins, and bullion; (d) loaning money on personal security; (e) obtaining, issuing, and circulating notes according to the provisions of this title."

Under the Federal reserve act the banks are further authorized under specified restrictions to make certain loans on real estate.

National banks are not given either expressly nor by necessary implication the power to act as agents for insurance companies or as brokers or agents for others in procuring or making real estate loans.

The courts have uniformly held that such corporations can exercise only those powers which are expressly granted or which are necessarily incidental to powers that are granted.

As stated by Mr. Justice Harlan, in delivering the opinion of the United States Supreme Court in the case of Logan County National Bank v. Townsend (139 U.S., 67):

"It is undoubtedly true, as contended by the defendant, that the national banking act is an enabling act for all associations organized under it, and that a national bank can not rightfully exercise any powers except those expressly granted by that act, or such incidental powers as are necessary to carry on the business of banking for which it was established."

Again in the case of *National Bank* v. *Matthews* (98 U.S., 625), Mr. Justice Swan, in delivering the opinion of the court, said:

"Section 5136 does not in terms prohibit a loan on real estate, but the implication to that effect is clear. What is so implied is as effectual as if it were expressed."

It is certainly clear that the Comptroller of the Currency has no right to authorize or permit a national bank to exercise powers not conferred upon it by law.

My investigations lead me respectfully to recommend to Congress an amendment to the national-bank act by which national banks located in villages and towns having a population of not exceeding 3,000 may be permitted to act as agents for insurance companies in the placing of policies of insurance — fire, life, etc. — and that they may also be authorized to act as agent for the negotiation of loans on farms or other real estate in their respective sections of the country, where they may be in a position to have some direct knowledge as to the value of the property upon which such loans are to be secured.

It seems desirable from the standpoint of public policy and banking efficiency that this authority should be limited to banks in small communities. This additional income will strengthen them and increase their ability to

make a fair return to their shareholders, while the new business is not likely to assume such proportions as to distract the officers of the bank from the principal business of banking. Furthermore in many small places the amount of insurance policies written or mortgages to be placed on commission is not sufficient to take up the entire time of an insurance broker, and the bank is not therefore likely to trespass upon outside business naturally belonging to others.

I think it would be unwise and therefore undesirable to confer this privilege generally upon banks in large cities where this legitimate business of banking affords ample scope for the energies of trained and expert bankers. I think it would be unfortunate if any movement should be made in the direction of placing the banks of the country in the category of department stores. The business is one requiring training, skill, and application, and I think that the profession of banking would suffer if there should be a departure from the principles which should govern and have heretofore governed.

I enclose with this a draft of a proposed amendment to the national banking act designed to empower national banks located in towns of not over 3,000 population, under such regulations and restrictions as may from time to time be approved and promulgated by the Comptroller of the Currency, to act as agents for the placing of insurance policies and also to act as agent in making or procuring loans on real estate.

I respectfully recommend and urge the adoption of such an amendment for the reasons I have given.

I am to-day writing a letter similar to this to Congressman Glass, chairman of the Banking and Currency Committee of the House of Representatives.

Respectfully,

Jno. Skelton Williams,
Comptroller

Hon. Robert L. Owen,
United States Senate.

No. 95-74

Supreme Court, U.S.
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SEP 14 1995
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1995

DON W. STEPHENS, COMMISSIONER, DEPARTMENT OF INSURANCE, COMMONWEALTH OF KENTUCKY, ET AL., PETITIONERS

v.

THE OWENSBORO NATIONAL BANK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

ANTHONY J. STEINMEYER
JACOB M. LEWIS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

JULIE L. WILLIAMS
Chief Counsel

L. ROBERT GRIFFIN
ERNEST C. BARRETT, III
JOAN M. BERNOTT
Attorneys
Office of the Comptroller of the Currency
Washington, D.C. 20219

18 pp

QUESTION PRESENTED

Whether 12 U.S.C. 92 (Supp. V 1993), which provides that national banks in places with no more than 5,000 inhabitants may act as insurance agents, preempts state law to the extent that state law prohibits banks from acting as insurance agents or brokers.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 44 F.3d 388. The opinion of the district court (Pet. App. 26a-49a) is reported at 803 F. Supp. 24.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 1994. A petition for rehearing was denied on March 15, 1995. Pet. App. 50a-51a. On June 1,

1995, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including July 13, 1995, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The primary respondents in this case are three federally chartered national banks, each owned by a bank holding company and each doing business in a Kentucky town with fewer than 5,000 inhabitants. Pet. App. 27a. In 1990, each bank requested from petitioner the Kentucky Commissioner of Insurance an application for a license to operate a general insurance agency. *Ibid.* Petitioner declined to provide the applications, and instead scheduled a hearing to determine whether issuance of licenses directly to banks would be consistent with Ky. Rev. Stat. Ann. § 287.030(4) (Michie 1988) (*reprinted at* Pet. App. 56a), which provides that "[n]o person who * * * owns or acquires more than one-half (1/2) of the capital stock of a bank shall act as [an] insurance agent or broker with respect to any insurance except credit life insurance, credit health insurance, [or] insurance of the interest of a real property mortgagee [*sic*] in mortgaged property, other than title insurance." The Commissioner had previously taken the position that Section 287.030(4) limits the activities of national and state banks with majority owners, as well as those of such owners themselves. See Pet. App. 5a, 27a-28a, 30a, 35a-36a, 41a n.7. The Commissioner's hearing was inconclusive, and the administrative proceedings were eventually stayed by a state court pending the outcome of this litigation.

2. Respondents filed the present suit in federal court seeking declaratory and injunctive relief, on the ground that federal law preempts application of Section 287.030(4) to deny them the insurance agency licenses that they seek. Petitioners relied on Section 13, para. 9, of the Federal Reserve Act, 12 U.S.C. 92 (Supp. V 1993) (*reprinted at* Pet. App. 52a), which provides that any national bank located and doing business in a place with no more than 5,000 inhabitants may, under supervision by the Comptroller of the Currency, "act as the agent for any fire, life, or other insurance company" that is authorized to do business in that State. The United States intervened to oppose petitioners' suggestion (see *id.* at 40a) that 12 U.S.C. 92 had been inadvertently repealed—a contention later rejected by this Court in *United States Nat'l Bank of Oregon* v. *Independent Ins. Agents of America, Inc.*, 113 S. Ct. 2173, 2187 (1993)—and to support respondents' arguments concerning the construction and preemptive force of federal law.

The district court granted summary judgment for respondents. Pet. App. 26a-49a. The court first rejected (*id.* at 29a-32a) petitioners' arguments that the case was not ripe, that respondents should be required to exhaust state administrative remedies, and that the court should abstain from deciding the case pending further state proceedings.[1] Petitioners aban-

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[1] With respect to ripeness, the court noted that the Commissioner has "long taken the position that the [respondent] banks are not authorized to act as insurance agents in Kentucky." Pet. App. 29a-30a. The court concluded that the Commissioner's position, demonstrated in part by his "aggressive stance" in this litigation, was "sufficiently final to concretely affect the [respondents'] interests," and that "absolutely

doned those contentions on appeal (see *id.* at 3a n.1), and they do not renew them in this Court.

On the merits, the court had "no difficulty" concluding that the Commissioner's application of Section 287.030(4) in refusing to consider respondents' license applications was "in direct conflict with federal law." Pet. App. 45a. The court then rejected petitioners' argument that the state provision was saved from preemption by Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. 1012(b). Pet. App. 45a-47a. That Act provides that federal law will not preempt a state statute "enacted * * * for the purpose of regulating the business of insurance," unless the federal law in question "specifically relates to the business of insurance." 15 U.S.C. 1012(b) (*reprinted at* Pet. App. 53a). The district court held that Section 92 "grant[s] additional powers to national banks," but does not constitute "a regulation of the business of insurance." Pet. App. 46a. Similarly, the court observed that Section 287.030(4) "relates to the powers of bank holding companies, not to the powers of insurance companies or agents," and "does not regulate the business of insurance." Pet. App. 46a-47a.[2] Having concluded that the McCarran-

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no purpose would be served by permitting the Commissioner to continue with his charade of evaluation before [the] court addresse[d] the merits of this litigation." *Id.* at 30a.

[2] The district court also rejected (Pet. App. 36a-40a) petitioners' contention that the restriction imposed by Section 287.030(4) was authorized by Section 7 of the Bank Holding Company Act of 1956, 12 U.S.C. 1846. The court of appeals likewise found Section 1846 "irrelevant to this case" (Pet. App. 10a), and petitioners have not renewed that argument in this Court (see Pet. i).

Ferguson Act had no application to this case (*id.* at 47a), the court declared that national banks located and doing business in Kentucky towns with 5,000 or fewer inhabitants have a federal right "to engage in the business of insurance, in accordance with applicable law," and enjoined the Commissioner from refusing to provide any such bank with an application for a license to act as an insurance agent in such a town (*id.* at 48a-49a).[3]

3. The court of appeals affirmed. Pet. App. 1a-10a. The court first rejected (*id.* at 3a-7a) petitioners' suggestion that there is no conflict between Section 287.030(4) and Section 92. Applying an "actual conflict" standard, the court pointed out that, "while § 92 provides that national banks such as [respondents] 'may' act as insurance agents, section 287 provides that they 'may not.'" Pet. App. 4a-5a. The court found unpersuasive petitioners' contention that Section 92 should be read as purely "permissive," and thus subject to whatever restrictions a State might choose to impose. The court observed that the statute is absolute in its terms (providing that banks "may * * * act as the agent for" insurance companies), that it "helps to define the powers of national banks," and that allowing enforcement of Section 287.030(4) would "interfere[] with the realization of a chief ob-

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[3] The court "decline[d] to determine whether the Commissioner is required to issue licenses once the completed applications are received," noting that the application of other state law criteria for the issuance of insurance licenses presented different issues and "[might] well implicate McCarran-Ferguson in other respects." The court therefore held only that Section 92 prohibits the Commissioner from "refus[ing] to provide the requested applications." Pet. App. 47a n.8.

ject of § 92" by removing an additional source of revenue that Congress meant to provide for national banks that serve small towns. Pet. App. 6a-7a. The court therefore affirmed the district court's ruling that Section 92 preempts petitioners' application of Section 287.030(4) to respondents under "conventional preemption analysis."

The court of appeals also rejected petitioners' reliance on the McCarran-Ferguson Act. Pet. App. 7a-10a. The court noted that Section 287.030(4) "helps to define the powers of Kentucky bank holding companies by excluding such companies from participation in the activities that constitute the 'business of insurance.'" The court observed, however, that "[e]xcluding a person from participation in an activity * * * is different from regulating the manner in which that activity is conducted" (Pet. App. 9a), and it concluded that Section 287.030(4) "was enacted for the purpose of regulating certain conduct by bank holding companies" (Pet. App. 10a), and not with "the 'end, intention, or aim' of adjusting, managing, or controlling the business of insurance" (*id.* at 9a, quoting *United States Dep't of Treasury* v. *Fabe*, 113 S. Ct. 2202, 2210 (1993)). Because the court held that Section 287.030(4) was not "enacted * * * for the purpose of regulating the business of insurance" within the meaning of the McCarran-Ferguson Act, it did not reach the question whether Section 92 "specifically relates to the business of insurance" for purposes of that Act. See Pet. App. 10a.

Judge Batchelder dissented. Pet. App. 11a-25a. Although she agreed with the majority that the Commissioner's application of Section 287.030(4) to respondents conflicted with Section 92, Judge

Batchelder disagreed with the court's McCarran-Ferguson analysis. See Pet. App. 11a. She concluded, instead, that in enacting Section 287.030(4) Kentucky "aim[ed] to protect or regulate the insurer/insured relationship" (Pet. App. 20a), and that the state law was therefore "enacted to regulate the business of insurance" for purposes of McCarran-Ferguson (*id.* at 21a). With respect to the second prong of McCarran-Ferguson, however, Judge Batchelder concluded that a court should apply a narrower standard to determine whether a conflicting federal law "specifically relates" to the business of insurance. *Id.* at 24a. Because "[t]he context of § 92 has always been within the regulation of banking rather than insurance" (*id.* at 23a), she would have held that the federal law did not contain a sufficiently "clear statement" that it was intended to regulate the insurance business or to preempt state law, and that the McCarran-Ferguson Act therefore saved Section 287.030(4) from preemption by Section 92. See Pet. App. 22a, 24a-25a.

ARGUMENT

The decision below in this case, although correct, conflicts with decisions of another federal court of appeals and of a state appellate court on a question of substantial importance to federal and state regulators, national banks, and issuers, sellers, and consumers of insurance products throughout the United States. The questions presented therefore warrant resolution by this Court. As petitioners point out (Pet. 17-19), however, this case is not the best vehicle for the consideration of those questions. We therefore agree with petitioners that this case should be held pending the Court's consideration of the peti-

tion in No. 94-1837, *Barnett Bank of Marion County, N.A.* v. *Gallagher*.

1. As both courts below (and the dissenting judge in the court of appeals) recognized (see Pet. App. 7a, 11a, 45a), Kentucky's general prohibition on banks' acting as insurance agents conflicts, as applied to the respondent banks in this case, with the insurance agency authority explicitly conferred on national banks by 12 U.S.C. 92 (Supp. V 1993). The proper resolution of this case therefore depends on whether normal principles of preemption are superseded in this instance by Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. 1012(b). In applying McCarran-Ferguson, the courts below held (Pet. App. 10a, 46a-47a) that Ky. Rev. Stat. Ann. § 287.030(4) (Michie 1988) was not "enacted * * * for the purpose of regulating the business of insurance" within the meaning of Section 1012(b).

That decision is correct. As the court of appeals held (Pet. App. 9a), Section 287.030(4) "in no way governs the manner in which the activities constituting the 'business of insurance' are conducted" in Kentucky. It imposes no standards, and requires or forbids no practices, related to the substance of that business. It regulates neither the "transferring or spreading [of] a policyholder's risk," nor any other practice that is "an integral part of the policy relationship between the insurer and the insured." *Union Labor Life Ins. Co.* v. *Pireno*, 458 U.S. 119, 129 (1982); see Pet. App. 7a-9a. Instead, as the court observed, it merely "helps to define the powers of Kentucky bank holding companies." *Id.* at 9a. Moreover, on its face, Section 287.030(4) applies only to "persons" (including bank holding companies) that

own more than half the capital stock of a bank. As noted above (see pages 3-4 & n.1, *supra*), the Kentucky Insurance Commissioner has interpreted the statute also to reach banks themselves if they are so owned. So far as we are aware, however, the Commissioner has never suggested that it would apply to a bank with no majority owner. It is difficult to understand why a rule intended to protect potential insurance buyers from some risk ostensibly involved in dealing with banks would depend for its application on the ownership structure of the particular bank involved. In fact, Kentucky's law attempts to regulate the structure and business of banks, not the business of insurance.[4]

Having held that Section 287.030(4) was not "enacted * * * for the purpose of regulating the business of insurance," the court of appeals did not address the second question under the McCarran-

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[4] The dissent below argues (Pet. App. 20a) that "the Kentucky legislature was concerned that if banks * * * were able to sell general insurance to their customers, the banks could unduly influence those Kentucky citizens and jeopardize the ability to pay claims when demands were made." With respect to solvency, it is not clear how the sale of unnecessary or unduly expensive insurance could jeopardize an insurer's ability to pay claims. If, on the other hand, the legislature's concern was that consumers "could feel coerced into purchasing insurance from the bank to obtain [a] loan regardless of the insurance premium" (*ibid.*, quoting *id.* at 59a), then Section 287.030(4) seems better characterized as a regulation of the relationship between banks and their loan customers—that is, of the business of banking—than of the business of insurance. Indeed, we note that federal banking law already prohibits national banks from tying the extension of credit to the purchase of any other product. 12 U.S.C. 1972 (1988 & Supp. V 1993).

Ferguson Act: whether 12 U.S.C. 92 "specifically relates to the business of insurance." 15 U.S.C. 1012(b). If, however, one were to conclude, as petitioners contend (Pet. 16-17), that Kentucky's effort to preclude banks with majority owners from acting as insurance agents was enacted to regulate "the business of insurance" for McCarran-Ferguson purposes, then surely one would conclude as well that Congress's express permission for national banks to engage in the same activities must "specifically relate[]" to the same business for purposes of the same federal statute. It is wholly implausible to contend, as petitioners do (Pet. 14-17), that a state law was enacted "for the purpose of regulating" a business but that a conflicting federal law does not even "relate" to that business.

2. The court of appeals therefore correctly held that nothing in the McCarran-Ferguson Act prevents 12 U.S.C. 92 from preempting the application of Section 287.030(4) to the national bank respondents under the circumstances of this case.[5] We agree with

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[5] See also *First Nat'l Bank of E. Ark* v. *Taylor*, 907 F.2d 775, 779-780 (8th Cir.) (state restrictions on sales of certain insurance by national banks not saved by McCarran-Ferguson), cert. denied, 498 U.S. 972 (1990); *United Services Auto. Ass'n* v. *Muir*, 792 F.2d 356, 364 (3d Cir. 1986) (state law prohibiting merger of bank and insurance company not saved because "affiliation between insurers and banks has no integral connection to the relationship between the insured and insurer" and anti-affiliation laws "have no part in the business of insurance under McCarran-Ferguson"), cert. denied, 479 U.S. 1031 (1987); *Independent Bankers Ass'n of America* v. *Heimann*, 613 F.2d 1164, 1170-1171 (D.C. Cir. 1979) (Comptroller's regulation of disposition of income from sale of credit life insurance by

petitioners (Pet. 14-17), however, that the court's decision conflicts with the decisions of the Eleventh Circuit in *Barnett Bank of Marion County, N.A.* v. *Gallagher*, 43 F.3d 631 (1995), petition for cert. pending, No. 94-1837 (filed May 8, 1995), and of the Louisiana Court of Appeals in *First Advantage Ins., Inc.* v. *Green*, 652 So. 2d 562 (Ct. App.), review denied, 654 So. 2d 331 (La. 1995), petition for cert. pending, No. 94-2130 (filed June 27, 1995). As we explained in our brief supporting the petition for a writ of certiorari in *Barnett Bank* (at 15-17), the holdings in these cases cannot be reconciled, and they leave national banks, federal and state regulators, and consumers subject to conflicting legal regimes on a matter of considerable commercial importance. There is no reason to believe that the conflict will resolve itself or become less important over time.

The non-preemption holdings in *Barnett Bank* and *First Advantage* permit significant, unwarranted state interference with activities that Congress has specifically authorized national banks to undertake. They also interfere with the Comptroller of the Currency's discharge of his "primary responsibility" for the supervision and regulation of those activities. See *NationsBank of North Carolina, N.A.* v. *Variable Annuity Life Ins. Co.*, 115 S. Ct. 810, 813 (1995); see also 12 U.S.C. 92 (Supp. V 1993) (subjecting banks' insurance agency activities to "such rules and regulations as may be prescribed by the Comptroller"). The Comptroller believes that agency sales of insurance can be a safe and important line of business that

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national banks preempted contrary state law, despite McCarran-Ferguson), cert. denied, 449 U.S. 823 (1980).

can contribute materially to a national bank's overall safety and soundness. Moreover, in the Comptroller's view, state restrictions that prevent national banks from exercising insurance agency powers authorized by Section 92 can put those banks at a serious disadvantage in the increasingly competitive market for all financial services. The Comptroller and the United States are also concerned that state restrictions of the type at issue here may operate to restrict competition, to the detriment of consumers, without significant countervailing consumer protection benefits. The questions presented in this case are therefore of considerable importance, and warrant resolution by this Court.

3. We also agree with petitioners (Pet. 17-19) that *Barnett Bank* provides a better vehicle than this case for this Court's consideration of the preemption issue. As we described in our brief supporting the petition in *Barnett Bank*, the court of appeals in that case found it necessary to reach both of the questions that may be pertinent under the McCarran-Ferguson Act: Whether the state law at issue was "enacted * * * for the purpose of regulating the business of insurance," and whether Section 92 "specifically relates" to that business. In this case the court of appeals reached only the first of those two questions. Pet. App. 10a. Although this Court might also find it necessary to reach only the first question, it would appear to be preferable to grant review in a case in which the court of appeals considered and decided both questions.

In addition, as described above (see pages 3-4, *supra*), the proceedings below in this case were complicated by a dispute over the proper interpretation of

the state law in question. The court of appeals decided the case on the assumption that the state law, which by its terms applies to banks' majority stockholders, also applies directly to the national bank respondents. See Pet. App. 5a. Although we have no reason to question that assumption, it appears that the question has not been settled as a matter of state law. *Ibid.*; see Pet. 18-19. It would appear to be preferable for this Court to grant review in a case in which the applicability of the challenged state statute to the party before the Court is unmistakably clear.[6]

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[6] We note that the petition in *First Advantage*, No. 94-2130, suggests (at 24-25) that that case would be the best vehicle for resolution of the preemption issue. The *First Advantage* court reached both questions under the McCarran-Ferguson Act, see 94-2130 Pet. App. 21a-27a, and we are not aware of any question concerning the application of Louisiana's anti-affiliation law to the petitioners in that case. Much of the state appellate court's analysis appears to derive, however, from the majority and dissenting opinions of the federal courts in this case and in *Barnett Bank*. See 94-2130 Pet. App. 27a-33a; compare, *e.g.*, *id.* at 19a-21a with Pet. App. 14a-15a. Although the *First Advantage* petition suggests (at 22-23, 25) that that case presents a separate issue concerning whether Section 92 is merely "permissive" (and thus presents no true conflict with a restrictive state law), the Louisiana court clearly held that Section 92 would preempt the State's anti-affiliation law but for the operation of the McCarran-Ferguson Act. 94-2130 Pet. App. 17a; compare, *e.g.*, Pet. App. 5a-6a (describing petitioners' similar "permissive" construction argument in this case), Pet. 14 n.10 (reserving same argument).

CONCLUSION

The petition for a writ of certiorari should be held pending consideration of the petition in No. 94-1837, *Barnett Bank of Marion County, N.A.* v. *Gallagher*, and disposed of as appropriate in light of the Court's disposition of that petition or its decision on the merits of that case.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

ANTHONY J. STEINMEYER
JACOB M. LEWIS
Attorneys

JULIE L. WILLIAMS
Chief Counsel

L. ROBERT GRIFFIN
ERNEST C. BARRETT, III
JOAN M. BERNOTT
Attorneys
Office of the Comptroller of the Currency

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